78-1339

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. A-702

ROBERT L. TAYLOR,
Petitioner,

vs.

NASHVILLE BANNER PUBLISHING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Tennessee

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FOREWORD

Counsel for petitioner is mindful of the rules of this Court requiring accuracy, brevity and clearness in presenting whatever is essential to a ready and adequate understanding of the points requiring consideration and has endeavored to comply with these rules.

The Opinion of the Court of Appeals which is complained of states:

ASSIGNMENT OF ERROR IV

> In this assignment, plaintiff contends that the trial court weighed the evidence and determined the credibility of witnesses, neither of which may properly be done in considering a motion for summary judgment. The only conflict in the evidence that is even arguably material, and the only evidence that could have been weighed or evaluated on the basis of credibility is the inconsistencies in the two depositions of Will Cheek. These inconsistencies involve what Cheek, one of the sources for the May 30 article, told the Banner in connection with that article. We have already decided, however, that the most favorable view to plaintiff that we could possibly take of Cheek's inconsistent testimony is to disregard it altogether. This decision, fully explained above in our discussion of the issue of actual malice in the publication of the May 30 article, means that it is irrelevant whether or not the trial court weighed Cheek's inconsistent evidence on the issue of actual malice in the publication of that article. In no other instance could the trial court have weighed evidence or guaged credibility, for in no other instance was there any material evidentiary inconsistency capable of being so resolved. We hold that the trial court followed proper summary judgment procedure on all issues which have

been discussed, and on which its decisions have been affirmed, in this opinion.

Appendix A, p. A-1

The Court of Appeals in its Opinion on Petition to Rehear stated:

OPINION ON PETITION TO REHEAR

Plaintiff Taylor has filed a brief petition to rehear in which he asks how this Court can ignore the first deposition of Will Cheek and "import absolute verity" to the second. We think it clear from the principal opinion, however, that we did not view Cheek's depositions in this way. Rather, we assumed that his inconsistent statements had the effect of "cancelling each other out," which left us with the testimony of Morrell and Long that Cheek was their source for the disputed statement in the article of May 30, 1974. Our approach to this issue has been fully explained in the principal opinion and will not be further recapitulated here.

The petition to rehear is respectfully denied.

Frank F. Drowota, III, Judge

Todd, J., concurs.
Blackburn, Sp. J., concurs.

Appendix C, p. A-29

Petitioner contends that it was error for the Court of Appeals to assume that the statements of the witness Cheek on his first and second depositions "cancelled each other out" leaving the Court only with the testimony of the *Banner's* editor and reporter that Cheek was the source of the disputed statement in the article of May 30, 1974; and further contends that the Court of Appeals "left" with the testimony of the *Banner's* editor and reporter erred in holding that there was no "material evidentiary inconsistency" presenting material and genuine issues of fact proper for determination by a jury which petitioner had demanded.

Insofar as there is a conflict between the requirements of brevity on the one hand and accuracy and clearness on the other hand, petitioner has deemed *specificity* essential to a ready and adequate understanding of the points requiring consideration. This accounts for what at first blush might be considered a sacrifice of brevity.

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To the Supreme Court of Tennessee

Petitioner, Robert L. Taylor, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered on November 6, 1978, in the cause styled *Robert L. Taylor v. Nashville Banner Publishing Company*.

OPINION BELOW

The Supreme Court of Tennessee in a *per curiam* order (J. Fones not participating) filed November 6, 1978 (Appendix D, page 39A), denied the petition for certiorari filed by peti-

tioner, Robert L. Taylor, seeking a supreme court review of a judgment of the Court of Appeals of Tennessee, Middle Section, filed March 31, 1978 (Opinion Appendix A, page 1A), petition to rehear (Appendix B, p. 36A) denied May 16, 1978 (Opinion Appendix C, p. 38A), affirming a judgment of the Circuit Court of Davidson County, Tennessee granting the motion of the defendant, Nashville Banner Publishing Company, for a summary judgment in petitioner's libel action.

JURISDICTION

This Court has jurisdiction of this case under 28 U. S. C. 1257(3) and Supreme Court Rule 19(a).

QUESTIONS PRESENTED

1. Were the publications in *The Nashville Banner* on the front pages May 30th and 31st, 1974 (See Appendix A to Opinion of Court of Appeals page 23A-32A) defamatory of petitioner? This question as regards the May 30 article was pretermitted by the Court of Appeals, one judge, however, in a separate concurring opinion expressing his disappointment that his colleagues were unwilling to join him in holding that the imputations of unethical conduct to petitioner in the May 30 article were of necessity libelous and saying

> "I challenge this Court and the Supreme Court to declare in ringing and decisive tones that, regardless of the method of selecting judges, the prescribed standards of professional and judicial conduct are mandatory at all times and that there is no holiday from them during an election season." (Appendix p. 34A)

2. Did the Court of Appeals properly apply the *New York Times Co. v. Sullivan* standard of "actual malice" in concluding

with respect to the May 30th article that there was no genuine issue of material fact as to the publication of the article containing the charges against petitioner with knowledge of the statement's falsity or reckless disregard for whether they were true or false?

3. Did the Court of Appeals properly hold with respect to the May 31st article that

a) The article was not defamatory because, although the article clearly and unambiguously reported charges of bribery, those charges were not levelled at the plaintiff; and

b) The defendant was constitutionally privileged as a matter of law because of the absence of any issue of material fact with respect to actual malice.

c) The conclusions above summarized rendered it unnecessary to consider petitioner's assignment of error asserting his contention that the occasion for the publication of the May 31st article was not conditionally privileged, and, if it was, the privilege was abused by excessive publication by the *Nashville Banner* with malice. (Appendix J)

d. The *Nashville Banner* in publishing the May 31 article was protected by a constitutional privilege while denying petitioner's claim to a Federally protected right to the enjoyment of the presumption of innocence—in particular the right to the benefits of that system described by the Vermont court in *Lancour v. Herald & G. Assoc.*, — Vt. —, 17 A2d 253, 132 ALR 495, as *not* allowing

> ". . . That any person should be subjected to unmerited obliquy through the publication of false accusations made to them in the course of their investigations, the tendency of which is, in the words of Ellenborough C. J., in Rex v. Fisher, 2 Camp. 563, 571 'to prejudice those whom the law still presumes to be innocent and to poison the sources

of justice.' And see, Barrows v. Bell, 7 Gray (Mass) 301, 316, 66 Am. Dec. 479. The public interest does not require that the right to enjoy a good name shall be made subservient to the right of free speech. State v. Colby, 98 Vt. 96, 102, 126 A 510."

4. Do the decisions of the Court of Appeals and the Supreme Court of Tennessee amount to state action denying rights claimed by petitioner under the Federal Constitution i.e.:

a) The right to a jury trial of issues of disputed fact as to whether the statements concerning petitioner were sheer fabrications by the newspaper or were published with knowledge of the statements' falsity or reckless disregard of whether they were true or false; and

b) The right to a good name and the presumption of innocence which is a privilege or immunity protected by the Fourteenth Amendment to the United States Constitution, as well as the right to due process of law and the equal protection of the laws under the Fourteenth Amendment?

These questions were raised in the state courts and decided adversely to his contentions. (Appendices E, F, G and H, pp. 40A et seq.)

5. Did the Tennessee highest courts decide a federal question of substance not heretofore determined by this Court, or have they decided it in a way not in accord with the applicable rule stated in *St. Amant v. Thompson*, 390 U. S. 727, 20 L. ed. 2d 262, 88 S. Ct. 1323, 1326 in these words

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

The above statement is the law which governs the decision in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution in pertinent part provides:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The Seventh Amendment to the United States Constitution provides in pertinent part

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

The Fourteenth Amendment to the United States Constitution provides

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE STATUTES INVOLVED

The Tennessee "Election Code" (Acts 1972 (Adj.S.), ch. 740; *Tennessee Code Annotated* 2-101) contains a provision defining the offense of bribery (Sec. 2-1927) and prescribing penalties for the commission of the offense as for a felony and disqualification from holding office for a period of six (6) years (Sec. 2-1928).

STATEMENT OF THE CASE

Factual Background

The opinion of the Court of Appeals (Appendix A) contains a rather full statement of the events leading up to the publications in question. A repetition of the facts about the origin of the case, therefore, is deemed to be unnecessary here.

The May 30 article—its defamatory nature

This article was copied in its entirety as an appendix to the opinion of the Court of Appeals. (Appendix 23A; App. J)

Plaintiff in his complaint averred that the statement in this article amounted to a charge of the commission of the crime of bribery under the Election Code by the Plaintiff. The article quotes Will Cheek, Secretary of the Executive Committee as saying, "Judges are aware that this type of dealing is illegal, not to mention unjudicial."

T. C. A. 2-1927 (Voter accepting bribe) makes it unlawful for any person, directly or indirectly, by himself or through any other person "to receive, agree to receive, or contract for, before or during any . . . convention provided by law any . . . valuable consideration, or any office, place of employment for . . . any other person, for voting or agreeing to vote . . . or refraining or agreeing to refrain from voting for any particular person . . ., at or in connection with any such convention. . . ."

T. C. A. 2-1928 provides that the penalty for the offense mentioned in *2-1927* shall be a fine of not more than $1,000.00, or by imprisonment in the penitentiary for not more than 5 years, or by both fine and imprisonment, in the discretion of the jury. This by *T. C. A. 39-103* makes the offense a felony, and a disqualification for holding public office for five (5) years.

The article states that the plaintiff was attempting to get enough votes to overthrow the recommendation of Justice William H. D. Fones possibly by working a deal with the liberal element of the executive committee whereby a Judicial Selection Commission member would be made attorney general. It is further stated that East Tennessee had been for years the division with only one justice and the attorney general and that the Supreme Court selects the attorney general. This is in explanation of the previous statement in the article that the position of attorney general position could be the "pawn" that could push one candidate (Taylor by the force of the argument in the article) onto the ticket (one of the five Democratic nominees and the only nominee from West Tennessee).

The upshot of the article was that the plaintiff was soliciting commission members to agree to receive or contract for "a valuable consideration" or an "office, place or employment" for another person, viz, Russell Sugarman, for voting or agreeing to vote for Taylor or refraining or agreeing to refrain from voting for Fones "at or in connection with" the meeting of the executive committee.

In Tennessee solicitation to commit a felony is a misdemeanor, an indictable offense. *Gerwin v. State*, 212 Tenn. 653, 371 S.W. 2d 449.

It is immaterial that the Executive Committee did not have the power and authority to act as a general convention of the Democratic Party. It *assumed* the authority to choose the nominees for the Supreme Court for the Party. Therefore, the bribery section of the Election Code applied just as if it had the full legal authority and power of a general convention. In *Wells v. State* (1939), 174 Tenn. 552, 129 S.W. 2d 203, 122 A.L.R. 948 it was held that where defendant offered to a police officer if he would turn over to him an automobile confiscated for a liquor violation, the defendant was guilty under the statute punishing anyone who offers or gives anything of value to a police officer with intent to influence his acts, although the officer had no authority to release the automobile. The Court, by Chief Justice Green, said:

> Although the disposition of property seized by police officers under a search warrant and otherwise is directed and controlled by statute and such officers have no legal power to surrender or release the same, yet they do retain possession of such property for a time, and we think that a corrupt effort to induce such officers to give up the property seized is within the terms of our statute.

In *People ex rel. Dickinson v. Van De Carr, Warden of City Prison*, 87 App. Div. 84 New York Supp. 461, the New York Supreme Court, Appellate Division, held that where an alderman of the City of New York wrote the commissioner of street cleaning that, if he would reinstate a certain employee, the writer would help the street commissioner to obtain the money needed for a new plant in Brooklyn, there being then pending in the board of aldermen a bill to authorize an issue of corporate stock, "for new stock or plant for the department of street cleaning, borough of Brooklyn," the facts sufficiently tended to show an offense on the part of the alderman to warrant his being held to answer the charge of violation of a section of the penal code imposing a punishment on any public officer receiving or offering to receive, etc., a bribe. The court said:

> The interests of the public service require that public officers shall act honestly and fairly upon propositions laid before them for consideration, and shall neither be influenced by, nor receive pecuniary benefit from, their official acts, or enter into bargains with their fellow legislators or officers or with others for the giving or withholding of their votes, conditioned upon their receiving any valuable favor, political or otherwise, for themselves or for others. It was the duty of the relator to act fairly and honestly and according to his judgment upon the proposition of the street commissioner. It does not appear to have been the mandatory duty of the board of aldermen to favor the recommendation of Commissioner Woodbury. In these circumstances, it was the duty of the relator to favor or oppose the recommendation according to its merits or demerits. If, in his judgment, it should have been disapproved, he should have opposed it, and he should not bargain to vote for it upon obtaining an agreement from the street commissioner to reinstate Covino. It is quite demoralizing to the public service, and as much against the spirit and intent of the statute, for a legislator or other public official to bargain to sell his vote or official action for a political or other favor or reward as for money. Either is a bribe, and they only differ in degree. Nor should he, by holding out this inducement, have tempted the commissioner to act favorably upon Covino's application for reinstatement. This was undue influence, and would be detrimental to the public service. In addition to the word "bribe" in this section of the Code, other words are employed sufficiently broad to reach this case. It is a violation of the statute for a public officer to ask, receive, or agree to receive

"property or value of any kind, or any promise or agreement therefor," upon any agreement or understanding that his vote or official action shall be influenced thereby. It is clear that words "value of any kind," as here used, are more comprehensive than "property." The benefit which the relator expected to receive from the reinstatement of his constituent would, we think, be embraced in the meaning of this clause, and would also constitute a bribe. We are therefore of the opinion that the facts tend to show that the relator had offended against the provisions of section 72 of the Penal Code, and that he was properly held to answer upon the charge.

It follows that the order should be affirmed. All concur.

The defendant inserted the qualifying word "possibly", stating that Taylor was actively seeking the nomination "possibly by working out a deal with the liberal element," etc.—a sort of life jacket to cling to in case it had to answer for the charge. This little word is not enough to confer any immunity. The article stated as a *fact* that a "package deal" focusing on the attorney general position was coming out of West Tennessee. By eliminating Senator Gillock, the only other candidate from West Tennessee, there was no one left to work out such a deal except plaintiff.

Besides, the statement necessarily implied that plaintiff was the type of man who would be disposed to this type of dealing —which, according to Secretary Cheek, was "illegal, not to mention unjudicial." The article was plainly defamatory of the plaintiff.

The May 30 article—a case of fatal parthogenesis—the Banner's attempted cover-up of non-existent "sources"

Painstaking discovery proceedings finally established that the statements concerning petitioner were a creation of the brain of the *Banner* editor, Kenneth Morrell.

Petitioner brought an action in the Chancery Court for Davidson County against The Tennessee State Democratic Executive Committee and William H. D. Fones alleging among other things that certain members of the liberal faction of the Tennessee State Executive Committee, along with others acting in conspiracy and concert with them, launched a campaign to destroy his standing with committee members by falsely charging that he was actively working up a "package deal" with the State Attorney General position as the pawn that would secure his nomination; and that these false charges were published in *The Nashville Banner* on Thursday, May 30, 1974. The complaint in the action in the Davidson Chancery Court was filed before the August 1st election and sought to have the nomination of the defendant Fones declared void.

After the election Petitioner brought an action in the Shelby County Chancery Court against the Democratic State Executive Committee and the defendant William H. D. Fones, making substantially the same allegations and seeking a declaration that the election of the said Fones was void.

In the Shelby County case, Petitioner took the discovery depositions of all the persons who he thought might possibly have been sources of the information published in the May 30th article in the *Banner* and was not able to discover *any* source who gave the *Banner* information on which it published the defamatory charges concerning him.

Thereafter, on May 27, 1975, Petitioner filed the complaint in this action in the Circuit Court for Davidson County against the Nashville Banner Publishing Company alleging that the article published in the *Banner* on May 30th charged him with the commission of the crime of bribery under the Election Code, that the charge was false and was published by the defendant recklessly without probable cause and with malice and was libelous *per se*. In the Complaint, Petitioner also alleged that the article on May 31st contained a false charge by a member

of the Executive Committee that an attempt had been made to buy her vote, that this charge was published by the defendant recklessly and without probable cause to believe that plaintiff was guilty of such a bribe attempt; that the publication was made by the defendant with malice and that the charge was libelous *per se*. (Rec. Vol. I, page 7.)

The Defendant on June 18, 1975, filed an answer to the complaint admitting the publication of the two articles, but averring that neither of the articles, when construed as a whole, was libelous or defamatory and denying that the articles were published recklessly; and asserting that they were in fact substantially true. The defendant further asserted as a defense a privilege under the First and Fourteenth Amendments to the United States Constitution upon the ground that the plaintiff, as a candidate actively seeking the Democratic Party's nomination for a seat on the Tennessee Supreme Court, was a public figure or public official under applicable law; and that the articles on the subject of the litigation were not published by defendant with "actual malice." (Rec. Vol. I, p. 12)

On June 27, 1975, Plaintiff served upon the defendant a notice to take the depositions of Kenneth Morrell, editor of the defendant, and Ed Long, the reporter of the defendant who wrote the May 30th article. The defendant moved for an order of court directing that the depositions of Kenneth Morrell and Ed Long not be taken. The motion was based upon allegations that the plaintiff in the suit in the chancery court of Shelby County had subpoenaed Mr. Morrell, Mr. Long and Larry Brinton, the reporter of the defendant who wrote the May 31st article, that the defendant had invoked the privilege of the Newsman's Shield Law (*T. C. A. 24-113*, et seq.) and the witnesses refused to answer the questions propounded to them which sought information or the source of the information procured for publication; that the plaintiff sought to have the statute declared violative of the Tennessee State Constitution and the

chancellor sitting in the Shelby County case had ruled that the statute was not unconstitutional. It was further alleged in the motion that the plaintiff had filed the libel action not to redress any alleged damage to his reputation but solely in an illegal attempt to circumvent the invocation of the Shield Law, the law containing the provision that there was no privilege against disclosure the source of information in any case where the defendant in a civil action for defamation asserted a defense based on the source of the information. The motion concluded:

> "In short, plaintiff is attempting to use this Court as his vehicle for an illegal attempt to circumvent a legal and valid assertion by representatives of the defendant of the Tennessee Newman's Shield Law, and this Court should order pursuant to the provisions of Rule 30.02 of the Tennessee Rules of Civil Procedure that depositions of Kenneth Morrell and Ed Long not be taken."

Rec. Vol. I, pp. 16-18

The plaintiff moved to strike the defendant's motion for a protective order upon the following grounds:

1. Plaintiff's motive in bringing the action is not the subject of judicial investigation and cannot be inquired into.

2. The Motion for Protective Order is scandalous in that it imputes misconduct to plaintiff's attorney amounting to an abuse of process.

Rec. Vol. I, p. 19

Plaintiff's motion to strike was supported by a brief.

Rec. Vol. I, p. 20 et seq.

On July 28, 1975, Judge John L. Uhlian in this case, entered an order overruling the defendant's motion for a protective order

without prejudice to the renewal of the motion at any time after the amendment of defendant's answer to state that the defendant did not assert a defense based on the source of the information.

Rec. Vol. I, p. 23

On August 6, 1975, the defendant filed a motion to rehear its motion requesting an order that the witnesses not be required to disclose the source of information made confidential by *TCA 24–113*, stating in the second motion that when the first motion was heard on July 25, 1975, it had witnesses present and had requested in the motion an evidentiary hearing, that the Court initially indicated an intent to rule on "another motion in this cause in such a way as to cause this case to be dismissed, and, therefore, heard no proof and no argument of counsel in regard to the motion concerning witnesses." In conclusion the motion stated:

> "Therefore, defendant respectfully submits that he (sic) is entitled to present evidence and argument to the Court in support of the motion."

Rec. Vol. I, p. 24

On the 19th day of August, Judge Uhlian, upon his own motion, entered an order stating in part:

> "Upon reconsideration of the record, the argument of counsel, and the applicable law, the Court is of the opinion that the determination of the issue presented by said motion should occur after disposition of all other preliminary motions, including motions for summary judgment and that, pending the final disposition of said motion, said depositions should be deferred.
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that said Order of this Court, dated August 6,

1975, and entered in Minute Book 112C, page 1072, be and the same is hereby amended by striking the last paragraph thereof and substituting therefore (sic) the following:

> "It is therefore ORDERED by the Court that the depositions of Kenneth Morrell and Ed Long not be taken until further Order of this Court.
>
> "Entered by the Court upon its own motion, this 19th day of August, 1975."
>
> /s/ John L. Uhlian
> Judge

Rec. Vol. I, p. 25

On August 20, 1975, James F. Neal, attorney for the defendant wrote a letter to Judge Uhlian stating that "the defendant does interpose defenses to the complaint filed in this cause which, if reached, will involve reliance on sources for the articles which are the basis of the complaint in this case . . . If the case is not resolved prior thereto, the defense of actual malice will involve reference to sources."

> *Copy of letter filed as Exhibit "E" to Affidavit of Fyke Farmer filed December 3, 1976, transmitted in separate envelope and part of record on appeal*

The plaintiff in the suit in the Chancery Court of Shelby County subpoenaed James E. Long, Jr., Kenneth Morrell and Larry Brinton for examination for the purposes of discovery on August 27, 1975. The witnesses appeared accompanied by Mr. Neal, attorney for the *Banner*. Mr. Long, first sworn, admitted that he wrote the article of May 30th and then in response to the question whether the article as it appeared was exactly as he wrote it, began to answer, "No, I didn't——", whereupon interrupted the examination and after a rather heated

colloquy about Mr. Neal's coaching the witness, Mr. Neal accompanied by the three witnesses left the room.

See court reporter's transcript of the proceedings on August 27, 1975 Exhibit "F" to Affidavit of Fyke Farmer filed December 3, 1976

The defendant, after having obtained the order preventing plaintiff from taking the discovery depositions of Kenneth Morrell and Ed Long until after dispositions of motions for summary judgment, on October 8, 1975, filed a Motion for Summary Judgment. (*Rec. Vol. I, p. 26.*) The Motion was supported by affidavits of Kenneth Morrell, James Edwin Long, Jr., Larry Brinton and the depositions of Helen Brown, Gena Carter, Will T. Cheek, Gil Merritt, James Sasser, Mary Shaffner, Thomas H. Shriver and William Henry Taylor taken by the plaintiff Robert L. Taylor in the case of *Taylor v. Tennessee State Democratic Executive Committee et al., No. 79507 IRD* in the Chancery Court for Shelby County, Tennessee at Memphis, Tennessee on January 14, 1975, and the depositions of Mansfield Douglas, Andrew Gardner, Mary E. Harrison and Fate Thomas taken in the same case on February 13, 1975.

See: Affidavits in Rec. Vol. I, pp. 27-35 Copies of depositions transmitted separately

Mr. Morrell, in his affidavit stated that he was aware of extensive investigations conducted by Larry Brinton and James Edwin Long, Jr., concerning the respective facts and circumstances which were the subject of the two articles on May 30th and 31st, 1974, that at the time these articles were published he had no knowledge that any statements contained in the articles were false; that he had no reason to believe that any of the statements contained in the two articles were false and that based upon his knowledge of the nature and extent of the investigation conducted by Mr. Long and Mr. Brinton concerning the facts and circumstances which were the subject of the two

articles he "honestly and reasonably believed that all of the statements contained in the two articles were not false." (Rec. Vol. I, p. 27)

Mr. Long, in his affidavit, stated that the May 30th article was written by him, that prior to the publication of that article he conducted an extensive investigation and interviewed numerous individuals concerning the facts and circumstances which were the subject of the article, and had no reason to doubt the credibility of any person quoted in the article or used as a source for the article; that at the time the article was published he had no knowledge that any statements contained in the article were false: and that he exercised reasonable care in investigating the facts and circumstances surrounding the events described in the article and had no reason to believe that any statements contained in the article were false.

Rec. Vol. I, p. 29

The persons quoted in the article of May 30th were:

State Senator Ed Gillock

Ronald Borod

Senator William Peeler, of Waverly, Tennessee.

Will Cheek, Secretary of the Tennessee State Democratic Executive Committee.

Gilbert S. Merritt, Jr., legal counsel of the Judicial Selection Commission.

John Wade, Chairman of the Judicial Selection Commission.

The pith of the article is the above-quoted paragraphs stating as a *fact* that a "package deal" was coming out of West Tennessee focusing on the state attorney general position as being the pawn that could push one candidate (in the following para-

graphs identified as plaintiff Taylor) onto the ticket. The only indication contained in the article as regards the source of this particular information is in the following paragraphs:

> "State Senator Ed Gillock of Memphis, who appeared before the commission as a candidate for the high court and was not recommended, reportedly said there is such a deal being made among committee members.
>
> "Gillock said that he is running for the Supreme Court nomination. He is busy contacting committee members to get their votes.
>
> " 'The situation is very, very fluid at this time and that's all I can say,' the senator said."

The inquiry, of course, needs to be focused upon the word "reportedly." The reporter, Mr. Long, did not say that Senator Gillock said there was such a deal being made among committee members. He only stated that Gillock *reportedly* said there was such a deal. Significantly, he put quotation marks around "The situation is very, very fluid at this time and that's all I can say."

Another part of the article may possibly be viewed as providing some color, though very faint it is, to the particular charge against plaintiff is the attribution to Senator William Peeler in these words:

> "Choose Slate
>
> "Senator William Peeler, Waverly, said 'I think there's going to be an effort made to choose a slate (sic) of candidates the panel selected.
>
> " 'There will also be some candidates that will run who were not recommended by the commission. I would expect Bob Taylor would run regardless of what the commission did.'

> "About the possibility of a deal between the candidates to also place a sixth person into consideration who would be named attorney general if a 'package' was selected, Peeler said, 'There's been some discussion along those lines. I don't know how serious the discussions have been.'
>
> "The veteran lawmaker indicated that the candidates may be more interested in securing their own nominations than in selecting the attorney general."

For the present study of the defendant's supporting documents filed with the motion for summary judgment, we put to one side those relating to the May 31st article and look only into the showing made by the defendant concerning the sources of the May 30th article. All the depositions in the Shelby County Chancery case were with relation to the May 31st article except the deposition of Will T. Cheek. Referring back to the May 30th article, it will be noticed that Mr. Cheek was not quoted in the article as being a source of the information about the "deal" involving the office of the attorney general. Rather the converse was true. The part of the article in which Mr. Cheek was mentioned is as follows:

> Will Cheek of Nashville, secretary of the committee, said, "I haven't seen a block vote or 'slate' happen yet and I don't think it will because of the interpersonal relationship among committee members." He did say that all of the candidates had called him and sent letters to him as well as other members.
>
> "Judges are aware that this type of dealing is illegal, not to mention unjudicial," Cheek said.

Mr. Cheek, in his deposition taken by the plaintiff in the Shelby County case on January 14, 1975, with Mr. Neal appearing as attorney for Kenneth Morrell who was subpoenaed for the same day present, was asked whether the ***Banner*** article of May 30th quoted him correctly. He testified that Ed

Long called him and that the "tone" of the article was correct as regards the statements attributed to him. He said "I can't vouch for the wording, but the tone is correct. I said something like that, yes, sir." His further testimony is:

Q. Then this article continues "Judges are aware that this type of dealings is illegal not to mention unjudicious", Mr. Cheek, did you make that statement?

A. Yes, sir. Something of that effect.

Q. To what were you referring that this type of doing (dealing) was illegal?

A. Block voting, trading votes.

Q. Was that in response of questioning of you by Mr. Long?

A. Yes, sir.

Q. Prior to the time Mr. Long called you had you communicated with anyone with the Nashville Banner or any representative of the Banner concerning this alleged dealing or swapping votes?

A. I don't remember if I did.

Q. Did you have any knowledge or information prior— at the time Mr. Long called you of any attempted vote swapping or dealing in the sense which you used those words there?

A. I had knowledge of rumors of this happening. I had no hard knowledge of anything, you know, I had knowledge of rumors of those things. I had no firm knowledge. There is no such thing.

Q. No such thing as what?

A. Firm knowledge, it just doesn't exist.

Q. Of your own personal knowledge you had no knowledge.

A. Right.

Q. But, you had heard rumors?

A. Yes, sir.

Q. From whom did you get those rumors?

A. You name it and I got rumors, you know, rumors in something like this you hear thirty a day, you know, so and so traded his vote, this happens most of it usually is not true.

Q. With whom have (had) you talked about this prior to the interview?

A. Mr. Farmer, at that time I was talking to an average of fifty people a day about this subject. It fairly well consumed my waking hours. I was speaking to a lot of people about it, awful lot.

Q. The subject of the election?

A. Yes, sir.

Q. And the candidates for office?

A. Right.

Q. You did talk to Mr. Robert Taylor here about it before this article appeared?

A. Yes, sir. I assume so. I am sure I did.

Q. Can you recall any person specifically that you talked to about this alleged vote swapping?

A. Again that is the tone of every conversation. That's, you know, whose trading with who and whose doing what, you know, that's implicit in political dealings, and you know, everyone speculates that so and so done this or so and so done that.

Q. But, my question is can you name anyone person specifically that you talked to about it, had such conversations?

A. I can name you a hundred. I can't name one person.

* * * * * * *

Q. Did you talk to Mr. Taylor about it?

MR. BARRETT: Which one?

Q. Mr. Robert L. Taylor?

A. I don't remember.

Q. Did you talk to Mr. Kenneth E. Morrell, the Editor of the Banner about it?

A. I don't believe I talked to Mr. Morrell.

Q. Are you sure?

A. I am not positive. I am pretty sure that I did not speak with Mr. Morrell during this period of time at all.

Q. Did Ed Long the reporter tell you anybody else he talked to about it?

A. I don't think so. I don't believe so, he could have. I just—I don't think so.

* * * * * * *

Q. The article states concerning former Chancellor Robert L. Taylor that Taylor is actively seeking the nomination possibly by working a deal with the liberal element of the Executive Committee whereby judicial selection commission member Russell Sugarman, a black would be made Attorney General is a 'slate' is selected including Taylor. Did you give that information?

A. No, sir.

Q. Opinion?

A. No, sir. I was not of that opinion.

Q. To Mr. Ed Long?

A. No, I was not of that opinion.

Q. Did Mr. Long ask you whether or not Mr. Taylor

was actively seeking the nomination by working out a deal with the liberal elements?

A. I don't remember, but there are two situations there. One is a deal for a certain specific end, Mr. Sugarman being Attorney General and the other one is a deal between the left and the right. That was discussed, the deal between the left and the right, the balancing.

Q. Was it discussed between you and Long?

A. No, there was under discussion, Judge Taylor and I discussed this. But, in terms of discussing it for Mr. Sugarman to either be a Judge or be Attorney General was not discussed at all. There was a rumor about it, but no truth to it.

Q. You didn't discuss that with anybody?

A. No, sir.

Cheek deposition January 14, 1975 pp. 5-14

On October 17, 1975, the plaintiff filed a motion in this case to vacate and set aside the order dated the 19th day of August, 1975, staying the plaintiff from taking the discovery depositions of Kenneth Morrell and Ed Long. The motion was presented to Judge Uhlian on October 24, 1975, and on October 28, 1975, an order was entered continuing the motion "until such time as the defendant's motion for summary judgment has been properly brought on for hearing and has been considered by the Court, at which time this Court will determine whether plaintiff's motion should be granted or denied."

Rec. Vol. I, p. 37

No motion for a summary judgment had been filed at the time of the entry of the order.

On December 8, 1975, an order was entered in the Shelby County case reciting that the Nashville Banner had agreed that the depositions of James Edwin Long, Jr., Kenneth Morrell and Larry Brinton could be taken before the Reference Master of the Court. By the order the Chancellor, however, limited the examination so as to provide that the deponents would not be required to reveal information or sources of information procured for publication but that the newsman's privilege could be waived by the newsman.

Copy of Order Filed as Exhibit "K"
to Affidavit of Fyke Farmer

On December 17, 1975, the plaintiff in the present case filed interrogatories propounded to the defendant Nashville Banner Publishing Company. (Rec. Vol. I, pp. 39-40) The defendant filed answers to the interrogatories on January 9, 1976. (Rec. Vol. I, pp. 41-45.)

The answers to the interrogatories which were sworn to by Kenneth Morrell, acting in his capacity as Editor of the *Nashville Banner* named Will T. Cheek as the source of the information in the May 30th article about the West Tennessee "package deal" whereby Russell Sugarman, would be made attorney general if a "slate" was selected including the plaintiff Taylor, and stated that this information was obtained by Ed Long and Kenneth Morrell. (p. 42)

In response to Interrogatory No. 1 asking the defendant to give the sources of all information procured by the Banner (whether published or unpublished) in the article of May 30th, the defendant named in addition to Will T. Cheek, the following:

Ed Gillock
Members of the Capitol Hill Press Corps
Ron Borod

William Peeler
Gil Merritt, Jr.
Frank Gorrell
John Wade

Rec. Vol. I, p. 41

On November 3, 1975, the plaintiff took the deposition of Gilbert S. Merritt, Jr., who served as legal counsel for the Judicial Selection Commission and was quoted, along with Cheek, in the May 30th article as saying that the problem the committee would face on Saturday (May 1st, the date of the meeting of the Executive Committee) would be in the method of balloting. On his deposition, Mr. Merritt was asked whether prior to *Banner's* article of May 30th he had any knowledge that a deal was being discussed as described in the article as a package deal coming from West Tennessee focusing on the state attorney general position as being a pawn that could push one candidate onto the ticket, and replied:

> "I don't recall at this time any specific knowledge about that. There could have been some gossip about it. I just don't remember one way or the other. As of today I don't recall what, if anything, I heard about that."

Asked the question "You didn't sit in on any conversations where it was being discussed, he answered:

> "No, sir. Whether there was any general rumor about it, I just can't specifically recall now whether I heard anything back then or not. That's my answer to the question."

Merritt deposition, pp. 34-35

The plaintiff also on November 3, 1975, took the deposition of Mr. James Sasser, Chairman of the Tennessee State Democratic Executive Committee, and Party Chairman for the State of Tennessee. Mr. Sasser testified that he heard some gossip

that there might be an attempt to make some arrangements in regard to a package deal coming out of West Tennessee as mentioned and described in the language of the fourth paragraph of the May 30th *Banner* article but he didn't put much credence in it. He did not know from whom he heard it. Asked if it was gossip, he answered:

> "Yes, sir, there was a lot of—I say a lot—some gossip about this, and this was sort of the only political thing going on then, and it attracted a group, or some political gadflies that just sort of wanted to talk about this matter."

He couldn't name anyone in particular, and said:

> A. Well, in any discussion about any sort of so-called deal, in my judgment, did not come from what I considered to be responsible members of the executive committee."

Sasser, deposition, pp. 12-14

On November 10, 1975, plaintiff took the deposition of Senator J. William Peeler, a practicing attorney of Waverly, Tennessee. Mr. Peeler said that he didn't believe that he saw the May 30th article in the *Banner* at the time it came out. He had known Mr. Ed Long for several years and had no independent recollection of this particular interview. Asked if he had any knowledge or information along the lines of the statements in the article about a "package deal", he answered:

> A. Well, Mr. Farmer, I was not a member of the committee or commission, as you know. I was spending, along about this time, a great deal of time in Nashville, and I heard some discussions, yes, sir, but I was not an active participant in these discussions, but I heard some discussions, yes, sir, but I was not an active participant in these discussions, but I heard some discussions about a package trying to be put together, yes.

> Q. Were they discussions by members of the Tennessee State Executive Committee?
>
> A. No, sir. I don't think I ever heard it discussed by any members of the Executive Committee. It was just talk around the Capitol and in restaurants where you would have lunch there in the capitol group, primarily.
>
> Q. Were there discussions in which any of the candidates took part?
>
> A. No, sir, not that I know of.
>
> * * * * * * *
>
> Q. Mr. Peeler, in these discussions that you said you heard about the nominations, did you ever hear anyone suggest that Mr. Robert L. Taylor was a party to any kind of deal?
>
> A. I never did, sir. Never.

Peeler, deposition, pp. 3-8

On February 19, 1976, the plaintiff took the depositions of Kenneth Morrell and Ed Long. Mr. Morrell testified that Ed Long wrote the May 30th story on assignment from him—approximately a week or maybe ten days before the article appeared. We quote from the deposition given by Mr. Morrell:

> A. . . . . Approximately a week or ten days in advance of publication of this article, I had a telephone call from Will Cheek, who was a candidate for Democratic Executive Committeeman, and he wanted to have lunch with me to discuss his race for the Democratic Executive Committee post, and so I arranged to have lunch with Mr. Cheek and the two of us went to Ireland's Restaurant on Twenty-First, and so some of the information that is included in this is based on information Mr. Cheek gave me at that point.

Q. Was that the sole source of the information that you had about this particular subject of the supreme court nominations; that is, from Cheek? Was that the sole source? I'm not speaking of general knowledge.

A. The part of the story, keeping in mind that the portion of this conversation that dealt with the supreme court selection was only a portion of the discussion —most of the conversation involved the committee race.

Q. That was his interest?

A. That was his interest, and Mr. Cheek made reference to the fact that there was maneuvering going on, and so I pursued a line of questioning with him, as I recall, about who was lining up on whose side, and who was doing what. I was trying to find out all I could find out, of course, about how it was going, and who was doing what, was anybody promising anything, or were they not promising anything, and got from him the information that there was a lot of wheeling and dealing going on, or maneuvering, or words to that effect. I don't recall his exact words. I don't know whether the exact words are even in the story or not, but this was the inference.

Q. Well, did he relate that on the basis of any personal knowledge that he had?

A. I can't answer that, Mr. Farmer. I do not know. I cannot speak for his personal knowledge. I can speak only to what he told me.

Q. Did he represent to you that he had any personal knowledge about dealing? I am using "dealing" in a broad sense. That's the term that's used in this article.

A. I assume he was. I could only assume he was talking about things he knew. I just have no way of knowing whether he was speaking of personal knowledge or not.

Q. But you didn't ask him if he had any personal knowledge?

A. No, sir.

Q. Did he give you the names of any persons that might have knowledge of this?

A. Well, with respect to Mr. Taylor, the inference was that Mr. Taylor was seeking support from some West Tennessee members of the Democratic Executive Committee, and that there were reports that the attorney general's post was involved in that. The attorney general's post traditionally had gone to East Tennessee as a matter of practice since other members of the supreme court had been elected mainly from Middle and West Tennessee, and he made reference to that.

Q. Your conversation with him on that subject, then, was rather general. Is that it?

A. Sure. It was rather general, and it didn't surprise me that Mr. Taylor was seeking support, or that any other candidate was seeking support from members of the Democratic Executive Committee, because, after all, they were going to be making the judgment.

Morrell deposition of February 19, 1976, pp. 4-8

Although Mr. Morrell examined on direct by Plaintiff's attorney swore that he didn't recall Cheek's exact words and didn't know whether the exact words were in the story or not, Mr. Neal lead him on his cross-examination to swear to the contrary. We quote from the deposition:

BY MR. NEAL:

Q. Mr. Morrell, I am not quite sure it is clear, but in your conversation with Mr. Cheek at Ireland's Restaurant some week or ten days prior to the date of the article about which Mr. Farmer examined you, did Mr. Cheek tell you in substance, "Taylor is actively seeking the nomination, possibly by working a deal with the liberal element of the Executive Committee whereby the Selection Commission member, Russell Sugarman, a black, would be made Attorney General if a slate is selected, including Taylor?

A. Yes, sir.

Mr. Neal: "That's all."

Morrell, deposition pp. 11-12

Mr. Long whose deposition was taken by the plaintiff immediately after Mr. Morrell's deposition was taken, testified that the May 30th story came from an assignment he had from Mr. Morrell who told him that he had heard from a discussion he had had that there was "some talk about maneuvering to get the judicial nominations, and then that it might be a good story to check into." Morrell told him he heard it from Mr. Will Cheek. Initially he did not indicate any other source. He attempted to make a telephone call to Mr. Cheek and afterwards talked again with Mr. Morrell who said he thought Mr. Frank Gorrell knew something about "this" also. He then tried to reach Mr. Cheek and reached Mr. Gorrell by telephone from the Capitol press room. He asked Mr. Gorrell what he knew about "any maneuvering or dealing to get one of these seats and Gorrell proceeded to tell him what he knew about it. Mr. Gorrell told him "that there had been one hell of a lot of wheeling and dealing" and that "to the best of his knowledge there had been some maneuvering and pressure put on people, and that he thought most of it was on behalf of Robert L. Taylor." Mr. Gorrell told him that he had heard "this talk coming from people who were holding office in the Democratic Party,

and suggested that he contact Mr. Will Cheek for further information." It wasn't too much longer when he encountered Mr. Cheek on the first floor of the Capitol, and he talked with him at that time. As to what Cheek told him, Mr. Long said:

A. "He told me that there had been a lot of wheeling and dealing and went into some more details, and said that there was going to be an attempt to have a slate of candidates, that there had been a lot of maneuvering from all areas but that the big maneuvers were coming from Mr. Taylor."

Long said this talk with Cheek was on the same day he got the assignment from Mr. Morrell. He couldn't recall if the story appeared on the same day or not. He believed it was the next day, but he couldn't attest to it, he couldn't remember. The deadlines for the *Banner* were such that a story might be turned in and would not appear in the paper until the next day. As to how long he worked on the story, Mr. Long said that he worked on it all one day and he believed he worked on it some the next day. It was the only story he was working on at that time.

Long deposition of February 19, 1976, pp. 15-20

On January 30, 1976, the defendant filed a motion to have the hearing on its motion for summary judgment set for argument. (Rec. Vol. I, p. 46) On February 27, 1976, the plaintiff filed a motion for leave to amend his complaint. (Rec. Vol. I, p. 48) Both motions came on for hearing on March 5, 1976.

Prior to the date of the hearing plaintiff filed the following affidavits in opposition to the motion for summary judgment.

Affidavit of Robert L. Taylor filed March 4, 1976 (Rec. p. 51)

Affidavit of Edgar H. Gillock " " " " (Rec. p. 58)

Affidavit of Drue Smith " " " " (Rec. p. 62)

Affidavit of Frank C. Gorrell " " " " (Rec. p. 63)

Affidavit of John W. Wade " " " " (Rec. p. 65)

At the hearing on March 5, 1976, Judge Hal Hardin sat in the place of Judge Uhlian who had retired. Judge Hardin granted plaintiff's motion for leave to amend the complaint but refused to grant defendant's motion for a summary judgment holding that the sworn testimony of Will T. Cheek in the deposition taken in the Shelby County case by the plaintiff (which *defendant* had filed in support of its motion) denying that he gave any information to the *Banner* about a "package deal" coming from West Tennessee precluded a finding that there was no genuine issue of fact as regards the publication of the article with malice. On oral application of the defendant at the bar of the court, however, Judge Hardin consented to withhold formal ruling on the defendant's motion in order to allow the defendant to take the deposition of Will T. Cheek.

Order allowing the plaintiff's amendment to be filed was entered on March 15, 1976, and the amendment was filed. (Rec. Vol. I, pp. 67 and 67-A) The amendment was as follows:

> "The false charges and accusations were published in *The Nashville Banner* on May 30th and 31st, 1974, maliciously and were calculated by the defendant to injure plaintiff's candidacy for nomination by the Tennessee State Democratic Executive Committee at its meeting held on June 1, 1974, by bringing about the voting by the committee under the cloud of these charges and accusations, in ordinary course, and did produce actual damages to the plaintiff by causing him to fail to secure enough votes by committee members to obtain the nomination."

On March 15, 1976, the defendant filed an Amended Motion for Summary Judgment, the gist of which is:

> "An order was entered in this cause granting leave to the plaintiff to amend his complaint, which amendment alleges a new, different and additional cause of action. The additional cause of action pleaded by plaintiff in his amended complaint apparently attempts to plead a cause of action in the nature of the tort of intentional interference with prospective advantage.
>
> "The additional cause of action did not arise out of the transaction or occurrence which was the subject of the libel action previously attempted to be pleaded by plaintiff and as such the amendment does not relate back to the date of the original complaint.
>
> * * * * * * *
>
> "For all of the foregoing reasons, defendant respectfully requests the Court to enter summary judgment in its favor as to both the original libel action and as to the new and separate cause of action sounding in the nature of the tort of intentional interference with prospective advantage."

Rec. Vol. I, p. 68

The deposition of Will T. Cheek was taken by the defendant on April 1, 1976, and filed on April 12, 1976.

On April 12, 1976, on application of the plaintiff, plaintiff was granted an extension of time until May 7, 1976, to take depositions and obtain affidavits and other materials in opposition to defendant's motion for summary judgment. (Rec. Vol. I, p. 71)

On April 12, 1976, the defendant filed an amendment to its motion for summary judgment based primarily on Cheek's deposition and alleging in part:

At oral argument on the motion for summary judgment, the Court agreed to delay decision on the motion until the parties could take, and file with the Court, the deposition of Will T. Cheek. The deposition has now been taken and is filed herewith.

In his deposition, Will T. Cheek testified he did indeed inform Mr. Ken Morrell, Editor of the Nashville Banner, of the information quoted on page one of the complaint. Cheek deposition, pp. 7-8, 54. Equally important, Mr. Cheek testified that the idea of a "slate" which would involve plaintiff and a black from Memphis was discussed with and approved by plaintiff long before Mr. Cheek informed Mr. Morrell of this possibility. Cheek deposition, pp. 54, 57-61, 63. Thus, Mr. Cheek not only confirms Mr. Morrell's testimony as to the initial source of the story alleged by plaintiff to be false and defamatory, he states further that it was in fact true. (Rec. Vol. I, p. 73)

The conclusions drawn by the defendant from Mr. Cheek's deposition of April 1, 1976, are in serious dispute particularly because of the following testimony by Mr. Cheek on April 1, 1976, on cross-examination:

Q. In your conversation with Mr. Morrell, then, you are saying it was just speculation on your part?

A. Yes.

Q. Do you know the meaning of the word speculate?

A. I know what——

MR. NEAL: I believe the Court will. I object to the form of the question.

MR. FARMER: Well, I'm——

MR. NEAL: I withdraw the objection. I'm sorry, I guess——

THE WITNESS: I know what I think of as speculation, yes, sir.

Q. (By Mr. Farmer) Speculation means conjecture, means without foundation and fact, doesn't it?

MR. BARRETT: Well, I'm not sure it means that. I'm not going to let you give the definition and——

MR. FARMER: Well, what does he mean by speculation?

MR. BARRETT: Just ask him what he means by it.

THE WITNESS: I mean by that what you said and hypothesize, theorize.

Q. (By Mr. Farmer) Well, did you state to Mr. Morrell as a fact truth and fact, substantially true and factually true, that Mr. Taylor was attempting to put together a ticket of liberals and conservatives wherein Mr. Taylor would be the only nominee from West Tennessee?

A. No, sir, I had no basis for that fact.

Q. So you didn't tell him that?

A. Speculated.

Q. You——

A. You said was it true, did I say that it was true, and I didn't. I had no way of knowing what was true and what wasn't true.

Q. Well, did you tell him it was just speculation?

MR. NEAL: He's answered that. He said no.

THE WITNESS: I don't remember.

MR. NEAL: He said no. He's answered that. I object. It's been asked and answered.

Q. (By Mr. Farmer) Well, what did you tell Mr. Morrell? Tell us as near as you can remember now that your recollection has been refreshed exactly what you told Mr. Morrell on that point.

A. As nearly as I can remember—and I don't remember much——

MR. NEAL: Go off the record just a moment. (Off the record discussion not reported.)

THE WITNESS: Let me—you're asking me what Mr. Morrell and I discussed in the conversation. I have no remembrance as to whether I said, hey, this came from so and so source and I consider it good or whether or not I even made a statement as to whether or not I considered it fact, rumor or what. I don't know if I classified it as such.

I do—I am sure that we discussed the general area of this ticket being put together. I'm not—I'm not really sure that I even knew who was putting it together.

Q. (By Mr. Farmer) Well, are you sure——

A. It may be possible that Mr. Morrell asked me if Judge Taylor could have been involved in it and my answer was, well, if it's on his behalf, you could assume that he was. You know, you just—you don't know. It's just a casual conversation over lunch two years ago.

Cheek deposition April 1, 1976, pp. 21-23

The plaintiff on April 7, 1976, filed a request for admission by the defendant of the fact that the information in the *Banner* article of May 30th complained of in his complaint was not published by any other press or broadcast by any news media except the *Banner*. (Rec. Vol. I, p. 72) The defendant's response

was by an affidavit by Mr. Morrell that it was unable to either admit or deny the truth of the statement. (Rec. Vol. I, pp. 75-76)

On May 10, 1976, plaintiff filed depositions of Null Adams, Russell Sugarman and Frank Gorrell and a second affidavit of the plaintiff himself.

The plaintiff in his second affidavit stated:

"7. In my conversations with Mr. Cheek I never discussed a 'package deal' focusing on the state attorney general position as being a pawn that could push one candidate onto the ticket. Nor did I discuss with him working a deal with the liberal element of the executive committee wherby Judicial Selection Commission member Russell Sugarman would be made attorney general if a 'slate' was selected including me. I never had any such discussions with anyone. The first time I ever heard mention of any such discussion was when *The Nashville Banner* printed the charge in its article on May 30th. To my knowledge no other newspaper or news media published the charge." (Rec. 79)

Mr. Null Adams, who in May, 1974, was Political Editor of The Memphis Press-Scimitar, testified that he covered all of the Shelby County happenings and many of the statewide happenings that came over the wire, and sometimes on long distance telephone. Asked if he had any knowledge or information about the matter stated in the paragraph which was the subject of the Request for Admission submitted to the defendant, Mr. Adams answered:

"A. No. Sir, I did not, nor do I now. I think the first time I knew such a charge had been made was possibly this morning.

Q. How did you learn that?

A. While I was talking to Judge Taylor and asked him what the case was all about and he told me just briefly what you just said."

Dep. of Null Adams filed May 12, 1977, p. 8

Plaintiff took the deposition of Mr. Russell Sugarman on April 28, 1976. We quote from his deposition as follows:

Q. Do you know Judge Robert L. Taylor?

A. Yes.

Q. Do you know Justice William H. D. Fones?

A. Yes, I do.

Q. Did you have knowledge at this time this article appeared that Judge Taylor was attempting to get votes so he could get the nomination?

A. At that time each of the people seeking the endorsement of the Democratic Party were attempting to get votes.

Q. Was Judge Taylor one of them?

A. I believe he was.

Q. And Justice Fones?

A. Yes.

Q. Now, continuing to the next paragraph:

"Taylor is actively seeking the nomination possibly by working out a deal with the liberal element of the Executive Committee whereby Judicial Selection Commission Member Russell Sugarman, a black, would be made Attorney General if a 'slate' is selected including Taylor."

Q. Did you have any knowledge or information at the time this article appeared of this statement here, this matter as stated here, that Taylor was trying to work out a deal whereby you would be made Attorney General if a slate were selected?

A. Neither Judge Taylor nor any of the other candidates including the ones who finally went up ever discussed any deal, nor did I ever seek any such deal.

Q. Did you ever hear any information——

A. (Interposing) Not until I heard about this article.

Q. Did you ever have any discussion with anyone concerning the possibility of such a deal being worked out?

A. No.

Q. Did you ever hear any rumors of such a deal as that?

A. Involving me?

Q. Yes.

A. No. May I elaborate on that?

Q. Yes.

A. When the idea of the Democratic Executive Committee setting up a commission to interview and make recommendations back for a State Supreme Court slate for the November Election first came up, several people——

Q. (Interposing) You say "November"——

A. (Interposing) That was the August Election, when they went on the ballots, several people suggested that I should seek that and I believe if I had started I would have had a pretty good chance because I worked with members of that committee and I believe that my performance on that committee would have given them some good opinion, but I declined to do that and I had absolutely no interest in being a part of the administration of justice, so that never was—that or any other type of reward for voting for any of the people who were selected or any of the people who were trying to get the nomination.

Q. Did you ever discuss with any member of the Executive Committee, the State Executive Committee?

A. Well, that's a broad question. If somebody asked me if I was interested, I'm sure I would have said, "No," but I don't think that it was—I know that it was not discussed in the context, "if I vote for this person, he'll vote for you for Attorney General," no, that was never discussed.

Q. Were you ever asked by anyone, any member of the Executive Committee whether you would be a party to such a slate as that, a deal as that?

A. No, I don't think any of the Executive Committee members would have asked me that question.

Q. Did you ever discuss it with Mrs. Betty Lewis?

A. No.

Q. Did you ever discuss it with Mr. James Sasser?

A. No.

Q. Did you ever discuss it with Mr. Will Cheek?

A. No, sir.

MR. FARMER: That's all.

Sugarman Deposition pp. 8-12

The plaintiff took the deposition of Mr. Frank Gorrell on May 4, 1976. Mr. Gorrell testified in part as follows:

Q. Mr. Gorrell, were you contacted by Mr. Frank F. Neal who was attorney for the Banner in this case in regard to this particular lawsuit about naming you as the source of this article of this wheeling and dealing?

A. As I recall, Mr. Farmer, Mr. Neal called me at some point and stated that either Mr. Long or Mr. Morrell were going to disclose the sources. I do not know whether this was voluntarily being done, or in response to a court order, and he simply said, "You were one of the sources of the story," and I said, "Well, that's news to me." I said, "I don't recall ever having talked to Mr. Long or Mr. Morrell about this," and he said, "Well, do you have any personal objection to us disclosing that you were talking," and I said, "Absolutely none. I am sorry I do not remember it, but I have no obection, if Mr. Long says he talked to me, or Mr. Morrell says he talked to me, I have absolutely no obection whatsoever to you telling Mr. Fyke Farmer and Judge Taylor, giving them that information," and that's the extent, as I recall, of our conversation.

Q. But that still didn't cause you to remember.

A. No, because this was—you know, I forget what point in time this was, but I think it was after you had filed some motions in Memphis to compel the disclosure of the sources, but it did not help me remember, and I saw Mr. Long one day up there at the Capitol Club, and he asked me if I remembered having talked with him, and he tried to say he was in my office and where he was, but I ust simply did not remember.

Frank Gorrell, dep. pp. 10-11

A considerable part of the record bears on the uncertainty as to how Will T. Cheek's recollection was "refreshed". This involves depositions of Mr. George E. Barrett taken by plaintiff on May 10, 1976, and September 10, 1976, the deposition of Kenneth Morrell taken by the plaintiff on November 9, 1976, and a statement made by James F. Neal in open court on his motion to quash a subpoena issued and served upon him by the plaintiff for the taking of his deposition. Information that Will T. Cheek had a "refreshed" recollection was given to plaintiff's attorney in the form of a letter written to him by Mr.

Barrett bearing date of November 17, 1975. (See copy of letter attached to deposition of Mr. Barrett taken May 10, 1976, and marked Exhibit #1.)

Mr. Cheek when the defendant took his deposition on April 1, 1976, on cross-examination by plaintiff's attorney was asked whether he gave Mr. Barrett the information on which the statement in his letter about his changed recollection were based. His answers to this questioning were as follows:

Q. (By Mr. Farmer) I'm asking you now are the statements in that letter correct, all the statements?

A. Sir, no statement in a matter this complicated is anything more than substantiatively correct. You could spend all day going into the background of these statements.

Q. No statements of fact can be correct?

A. In and of themselves in a matter this complicated.

Q. Is there any respect in which that letter is not a true and correct statement of fact?

A. There is no respect in which it is not substantiatively a true and correct statement of fact.

Q. Well, substance means in essence and in fact, doesn't it?

A. It means in essence.

Q. Okay. All right. Did you tell him—did you give him the information, the statements? Did you give him the information on which he based the statements in that letter before it was written?

A. I assume so.

Q. Don't you know? Don't you know whether you did or not?

A. As far as I can tell, I did, yeah. I mean, if he had information from other sources on any of these facts then my statement would be incorrect if I said that I gave it to him. I have no way of knowing.

Q. Does he purport to give information on sources other than what you have told him?

A. I don't know. You'll have to ask Mr. Barrett.

Q. In the letter?

A. Does the letter purport to? No, sir, it does not.

* * * * * * *

Q. (By Mr. Farmer) When did you get a different recollection? When did you recollect that you had this luncheon meeting and a long conversation with Mr. Morrell?

A. Shortly before this letter was written, November 17.

Q. What was it that caused you to refresh your recollection?

A. Mr. Morrell.

Q. When did you talk to Mr. Morrell about it?

A. Well, I spoke with Mr. Morrell and Mr. Neal about it. They called it to my attention that there was—that I had said I thought I had not met with Mr. Morrell and Mr. Morrell's recollection was that I had met with Mr. Morrell. And when I—as soon as they mentioned it to me, I remember, yeah, I talked to Mr. Morrell. In other words, I was incorrect in my statement in the earlier deposition. I said I thought I had not spoken with Mr. Morrell. I was wrong, I had spoken with Mr. Morrell.

Cheek deposition April 1, 1976, pp. 15-18

Since Mr. Cheek did not know whether Mr. Barrett, when he prepared the letter of November 17, 1975, had information

from sources other than himself and said "You'll have to ask Mr. Barrett," the plaintiff called Mr. Barrett on May 4th and examined him on May 10, 1976. Mr. Barrett refused to answer questions about how he learned that Mr. Cheek had a "refreshed" recollection, as shown by the following excerpt from that deposition:

Q. My question is this, referring to this sentence in your letter, "In preparing for this deposition, Mr. Cheek now has a different recollection," and I ask you how you learned that Mr. Cheek has a different recollection.

A. I decline to answer that on the basis that it invades the attorney-client privilege.

Q. Did Mr. Cheek give you the information set forth in this letter of November 17, 1975?

A. I decline to answer that on the basis that that invades the attorney-client privilege.

Q. Well, I think you waived the attorney-client privilege when you wrote this letter communicating this information, and Mr. Cheek was examined about it, and you appeared there, and so I will have to adjourn this deposition until I get a ruling of the Court on whether you are required to answer the question.

Are you now adjourning the deposition?

Yes, sir.

Mr. Farmer: "I am adjourning the deposition until I can get a ruling of the Court on whether you are required to answer the question."

Barrett deposition of May 10, 1976, pp. 7-8

On September 10, 1976, Mr. Barrett was recalled at the instance of the plaintiff after plaintiff had moved the court for

an order compelling him to answer the questions and gave the following testimony:

Q. Was Mr. Neal the person who first advised you that Mr. Cheek had a different recollection?

A. I cannot remember whether Mr. Neal called me or Mr. Cheek called me and advised me that the recollection was different, but it had to have been after November 11th.

Q. After I had cancelled the deposition?

A. Yes, sir. Because you cancelled it as I recollect on the basis that you assumed it was essentially the same as the previous deposition. And if I remember our conversation, I said, I assume it will—it was.

Q. Did Mr. Cheek ask you to write this letter of November 17, 1975?

A. My recollection is that after I talked to Mr. Cheek I told him I was writing you that letter immediately to advise you because you had previously told me that you assumed the depositions would be the same and I felt an obligation as a lawyer to advise you that they were not to be the same. That he now had a different recollection.

Q. Mr. Cheek said you read the letter to him over the telephone?

A. My recollection is that's correct.

Q. The information set forth in your letter of November 17, 1975, is that the information that Mr. Neal gave you?

A. I don't remember whether Mr. Neal called me or Mr. Cheek called me and said that Mr. Neal had spoken to him about this matter, that he had called Mr. Neal about the matter. And then I asked him if I re-

member, for him to come down to my office and go over the deposition. And at that time I told him I would write you a letter and immediately notify you. So he either had to come down here the 16th or 17th. I dictated the letter and then I recall when I got it I called him to go over the letter with him to make sure that the representations in that letter were correct as far as he could recollect. I simply don't remember—I just don't recall right now. If I think of it after the close of the deposition, if my recollection is refreshed, I will write and state to you what I recall. But right now I cannot honestly recall which one said it first.

Q. That is who you got the information from first, originally?

A. That's right. That's right. That's to the best I can recollect right now. I know I talked to Mr. Neal during this course of time and I know I talked to Mr. Cheek. I cannot honestly say which one brought it to my attention first.

Q. That long answer you gave, I want to get it clear because I didn't understand exactly what you're saying. Did you say that Mr. Cheek came down to your office to go over his previous deposition with you?

A. I thought he did. I cannot remember whether he came to my office or I talked to him on the phone but I thought he came down here to my office. And that would have either been the 16th or the 17th of November. Because as soon as this information came to me, I communicated it to you without any delay.

Q. But that doesn't answer my question.

A. I simply don't remember, Mr. Farmer.

Q. You don't remember whether he came to your office and you went over this——

A. I have a recollection of him coming but I cannot say that with metaphysical certainty.

Q. Did you read this letter to Mr. Neal before you sent it to me?

A. I don't think so. I don't think so. I may have, but I don't recall it. I don't want to say categorically that I did not.

Q. What?

A. I don't want to say categorically that I did not. I do not recall it.

Barrett deposition November 10, 1976, pp. 7-10

Subsequent to the depositions of Mr. Cheek and Mr. Barrett, Mr. Morrell was recalled by the plaintiff on November 9, 1976. Mr. Morrell testified that a call was made to Mr. Cheek from the publisher's office of the Nashville Banner in October, 1975, "give or take a few days". There was a voice box connected with the telephone and this was used so that he and Mr. Neal could use it together. The conversation was not recorded. He did not remember whether he or Mr. Neal dialed the phone, but they both talked to him. He was asked to state what the conversation was, what he said, or what Mr. Neal said. They called Mr. Cheek to clear up his failure to recall the luncheon he had with him at Ireland's Restaurant sometime in late May of 1974. We quote Mr. Morrell's testimony on this point:

Q. What did Mr. Cheek say about that?

A. Well, Mr. Cheek remembered the occasion, of course, or said he remembered it. You'll have to ask Mr. Cheek. Mr. Cheek remembered, certainly, going to lunch with me at Ireland's Restaurant, and he remem-

bered the conversation and Mr. Long subsequently interviewing him about it.* You see this luncheon, Mr. Farmer, occurred some week or ten days before the Democratic Executive Committee met. It was after the Judicial Selection Committee had rejected Mr. Taylor as one of the eight candidates. Mr. Taylor had made public statements that were published in the Banner and the Tennessean and, I assume, other newspapers, but certainly in these two that the Selection Commission had been rigged against him. He had been rejected at this point by the Judicial Selection Commission. (Morrell, Dep. November 9, 1976, p. 6)

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* Mr. Barrett in his letter of November 17th, 1975, stated: "Mr. Cheek does remember talking to Mr. Long about the Supreme Court race but has no independent recollection about the essence of the conversation with Mr. Long." On direct examination by Mr. Neal Mr. Cheek gave the following testimony about his conversation with Mr. Long:

Q. All right. Now, after this meeting, did you have occasion—do you know a man named Ed Long?

A. Yes.

Q. Did you know him in May of 1974?

A. Yes.

Q. Did you have occasion to talk to Mr. Ed Long in May, 1974?

A. Yes, I did.

Q. Did you discuss basically the same subject?

A. Yes, sir.

Q. Did you make basically the same statement to Mr. Long?

A. I do not remember.

Mr. Farmer: What?

The Witness: I do not remember.

Q. (By Mr. Neal) What you're saying, then, you can't admit or deny it, you don't have any present recollection of it?

A. I don't have any present recollection of it at all. Let me add here that I would discuss things with Mr. Morrell over lunch that I would not discuss with a reporter.

Q. All right. Did Mr. Long call you and discuss the subject matter with you?

A. He did, yes, sir.

Q. All right. And did he indicate to you that he was following up your discussion with Mr. Morrell?

A. He may have.

Q. All right.

A. I don't know for sure but he may have.

Cheek dep. pp. 8-9

Mr. Neal's statement to the Court on November 12, 1976, about Mr. Cheek's refreshed recollection was as follows:

THE COURT: Let me be sure I understand, Mr. Neal. Prior to that conference call, had you discussed the case with Mr. Cheek?

MR. NEAL: I called Mr. Cheek on the phone.

THE COURT: When was that approximately?

MR. NEAL: It was approximately July 2, 1975. But at that time, Mr. Cheek's statement to me, to my recollection, was, I don't remember making a statement like that to Mr. Morrell. In other words, his statement to me was substantially consistent with his deposition.

THE COURT: And other than that, you had no other discussion with Mr. Cheek?

MR. NEAL: I have no recollection of any other discussion with Mr. Cheek. Mr. Morrell got on the phone with Mr. Cheek, and I was on the phone also. Mr. Cheek said, Oh, yes, I remember that; I did make that statement to you in substance. I said, Well, Mr. Cheek, you've testified otherwise or inconsistent with that in a deposition. I said, I suggest you contact your lawyer. I thereupon at some date later called Mr. Barrett, a friend of mine, a lawyer, and counsel for Mr. Cheek. And I said to Mr. Barrett, Mr. Bar-

rett—George, Mr. Cheek has made a statement in a deposition that is inconsistent with his present recollection as told to Mr. Morrell and me; maybe you'd better get with him. Now, about the story, I have very little recollection, but it seems to me that sometime later Mr. Barrett said to me, I talked to Mr. Cheek. And it seems to me that Mr. Barrett told me that he was going to write Mr. Farmer a letter and explain the matter and was sending me a copy. I thereafter got a copy of the letter about which Mr. Farmer is making his statement. Now, that, may it please the Court, is the situation. I personally resent Mr. Farmer indicating that that is anything—or even suggesting that that is anything—other than what counsel should do. It is not uncommon. And I will answer any other questions this Court has about the matter. I would ask for one thing, may it please the Court. We did not object when again Mr. Morrell was subpoenaed and his deposition taken again. This is the second deposition of Mr. Morrell while a motion for summary judgment is pending. The Court has put down at least one time limit for getting everything in. (pp. 12-13)

The May 31st article

The Banner published a defamatory story of an accusation made by a member of the Democratic Executive Committee that an attempt to bribe her to vote for the plaintiff as nominee for the Supreme Court in the election by the Executive Committee by a man and a woman whose names she could not recall. The *Banner* in the article stated that the committeewoman contacted her attorney, Gilbert Merritt, who took a statement from her and turned it over to District Attorney General Thomas Shriver, and that a detailed probe had been

launched into the allegation by the staff of the District Attorney General.

The article stated:

> "Meantime, Shriver said his investigators began the probe this morning.
>
> "We can't anticipate how long the investigation is going to take, but I doubt seriously it will be completed by Saturday, he commented.
>
> "The district attorney said he believed his investigators had learned the identity of the woman and expect to learn from her the man's identity.
>
> "Taylor could not be reached for comment. His Memphis law firm reported he was in Nashville for the weekend."

It is a general rule that the publication of reports of judicial proceedings is qualifiedly or conditionally privileged. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, it is considered that the general advantage of the country resulting from having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

The Tennessee Supreme Court declared the law in this state to be that the right of newspapers to publish without liability for damages extends to mere contents of pleadings filed in Court though no judicial action has been taken thereon, provided the publication is a fair and accurate statement of the contents of the pleadings, and made without malice. *Langford v. Vanderbilt University,* 199 Tenn. 399.

There are cases holding that newspapers and other media also have a qualified privilege to publish fair and accurate re-

ports of official proceedings. *Restatement of Torts Sec. 611 (1938); Harvard Law Review article on Defamation, Vol. 69, p. 928.*

Whether a privilege exists at all is a question for the court. *Restatement of Torts Sec. 619, Privileged Occasions.* The question whether the defendant acted for an improper purpose or in an improper manner is material if the publication is conditionally privileged. Under such circumstances, the qualified protection thus created is lost if the defendant utilized the privileged occasion for a purpose other than that for which the privilege was created, or if he otherwise abused the privilege. These are questions for the jury to determine unless the facts are such that but one conclusion can reasonably be drawn. *Restatement of Torts, Sec. 619,* accord: *Langford v. Vanderbilt University* holding the question of whether the publication was made with malice was a jury issue.

The plaintiff in this case says that the occasion for the publication of the May 31st article was not conditionally privileged, and if it was the privilege was abused by an excessive publication by the *Banner* with malice.

The mere fact that the person making the accusation was a member of the Democratic State Executive Committee created no privilege. It was a private affair she related, even though it touched upon her duty as a member of the committee in the matter of casting her vote in the election for a Democratic nominee for the State Supreme Court. It was not a report of any official proceedings by the Executive Committee. Neither was the communication of her accusation to the Prosecuting attorney by her own attorney a report of an official proceedings. Granting that her reporting of an alleged bribery attempt to the prosecuting attorney was privileged, absolute or qualified, the *publication* by her, or her attorney, of the charge would not be privileged. It appears from the article that she reported it to the newspaper. At least the newspaper wrote the story as having been given by her to its reporter, Larry Brinton. The repetition of the story by the newspaper was no more privileged than it would have been had the woman printed handbills and stood at the corner of Fourth and Union, Nashville and handed the handbills to passers-by.

The statement that Mrs. Brown had contacted her attorney, Mr. Merritt, who took a statement from her and turned it over to the prosecuting attorney did not immunize the repetition of Mrs. Brown's slanderous accusations. Granting, *arguendo,* that Mrs. Brown's story about two unidentified persons approaching her and offering to pay her money to vote for plaintiff of itself was not defamatory without innuendo, the Banner in its publication supplied the innuendo. The article was not focused on the two unidentified persons but on Taylor.

At the very commencement it was stated that "A member of the State Democratic Executive Committee today said an attempt was made this week to 'buy my vote' for Memphis Attorney, Robert Taylor, in Saturday's committee election for State Supreme Court nominees." There is a sub-heading, "Taylor Discussed." As a clincher the article concludes:

> "Taylor was one of a flock of Democrats who sought recommendation to the State Supreme Court by a special commission named by the Democratic Executive Committee.
>
> "The commission recommended eight persons, from which the executive committee can nominate five. Taylor was not one of the eight, but he still hopes to be one of the five nominees.
>
> "In its meeting Saturday, the executive Committee is under no obligation to choose from the eight persons recommended by the special commission.
>
> "Committee members privately have confided that political infighting and dealing for the five posts have been fierce."

In *Tomkins v. Wisener*, 33 Tenn. (1 Sneed) 458, it was declared:

> "It is certainly true that the slanderous words spoken must be shown to have an individual application to the plaintiff, and that he was the person intended to be designated. It is not absolutely essential, however, that in order to ground an action for slander the defamatory words should carry on their face an open and direct imputation of crime, or that they should designate by name the person at whom they are pointed; for, as has been justly remarked, calumny may be as effectually conveyed in artful allusions to collateral matter, and oblique insinuations, as by most explicit assertions; . . ."

The article, in its tone and with the exaggerated importance (at the top of page one of the paper) together with the concluding statements clearly implied that Taylor was behind the mystery callers on Mrs. Brown to convey a bribe offer. (See front page of article Appendix J, p. A-43)

It can hardly be supposed that the members of the Executive Committee assembling in Nashville on May 31st for the meeting the next day would have failed to make out that the charge of attempted bribery was leveled at petitioner.

Petitioner insists that the article was defamatory *per se* and actionable as such. If, however, it should be deemed that the publication was not actionable *per se*, he would be still entitled to recover because he alleged special damages in his amendment to the complaint filed March 5, 1976. (Rec. 67A) *Brown v. Newman*, 224 Tenn. 297, 454 S.W. 2d 120 is relied on as an authority for this proposition.

The only remaining question is: Was the occasion rendered privileged by the statement by the District Attorney General that he had launched a detailed probe into the allegation by his

staff? The plaintiff says that the answer to that question must be "No."

That act of the district attorney in *announcing* that he was making an investigation of the accusation, with all the excessive and flamboyant publicity, was a violation of his duty to preserve secrecy in order to protect the presumption of innocence which plaintiff was entitled to enjoy. The publication of the fact of the accusation in advance of the election was without any legitimate law enforcement justification. It is the primary duty of a lawyer engaged in public prosecution not to convict but to see that justice is done. Gen. Shriver testified in the deposition taken by the plaintiff in the Shelby County Chancery case which the defendant filed in support of its motion for a summary judgment that he called Ken Morrell who was the editor of the Banner, and told him about Mrs. Brown's accusation. (Dep. p. 6) He said,

> ". . . the final decision to call Ken Morrell was based on the proposition that if anyone was undertaking to bribe folks to get on the Supreme Court that the public ought to know about it and this witness was credible enough that this was a matter of some considerable public interest.
>
> * * * * * * *
>
> Q. Did you call the Banner because the Banner was the next paper that was to be published that day?
>
> A. Yes, sir.
>
> Q. First paper because the Tennessean is a morning paper and you called the Banner to get it into that day's paper?
>
> A. Let me add——
>
> Q. Is that a fair statement?
>
> A. Yes, sir.
>
> Q. You said Helen Brown was credible enough——

A. I had not met Helen Brown at that point. I was relying on the judgment of Mr. Merritt and I don't know whether James Sasser knew her or not. I would say —I would say—I would have to at that point—I was relying on Mr. Merritt's judgment that she was telling the truth.

Q. You didn't know her personally?

A. No, sir.

Q. And you have never had any dealings officially or otherwise?

A. Never met her until the following week when we got her to our office to discuss it further with her.

Q. Did you know Mr. Robert L. Taylor at that time?

A. Yes, sir. I am acquainted with him. I can't say that I know him well.

Q. Do you know he was a former Chancellor, Memphis, Shelby County?

A. Yes, sir. As I recall he was also on the Court of Appeals.

Q. Did you have any reason to believe that he was the type of man who would have been responsible for such an alleged attempt to bribe Mrs. Brown as was described in that affidavit?

A. Mr. Farmer, ask that question again, I am not sure——

Q. Did you have any reason to believe that he was the type of man who would have been responsible for such an alleged attempt to bribe Mrs. Brown as she described in this affidavit?

A. I will give you an answer to that if you want it.

Q. Yes, sir.

A. My answer would have to be based on experience—the only time I have ever met or known Mr. Taylor, that is in any capacity other than a public official was in connection with his attempt to get on the Supreme Court through a write-in vote campaign and I was involved in a lawsuit that wound up in the Supreme Court about that and I would have to say judging from his performance during that case that he was a man who was desperate to get on the Court. Now, whether he is a man that would bribe somebody I can't give you an honest judgment about that. I don't know and I still don't know as a matter of fact, but he was a man who had an overpowering ambition to be on the Supreme Court. That was my judgment about it.

Q. Well, bribery is an offense that involves moral purpitude?

A. Yes, sir.

Q. And his attempt to get elected to the Supreme Court that you litigated over, was there any moral turpitude involved in that?

A. Not in the sense of offering a bribe, no, sir.

Q. No moral turpitude, nothing involved in it, culpability?

A. No, sir, not culpability, propriety.

Q. Nothing moral, nothing as a wrongful act you could condemn morally?

A. No, sir.

Shriver deposition, pp. 6-10

Our system of justice and the rights of the individual, is founded on the principle of the presumption of innocence until the determination of guilt by a jury of the accused's peers. The

grand jury system was established by our Anglo-Saxon forefathers some centuries ago as an institution that secured the King's subjects against the oppression of unfounded prosecutions by the Crown.

Read the statement in *38 Am. Jur. 2d Grand Jury Sec. 2*:

> ". . . Although that reason may not have been the motivating factor in this country, the fact remains that the grand jury system was adopted here and for considerations quite similar to those of the mother country. Our adoption of the system was found on the theory not only of bringing wrongdoers to justice but also of providing protection against unfounded and unreal accusations *whether these had their origin in governmental sources or were founded on private passion or enmity.*"

And in furtherance of the policy of the law and the purpose of the system, the investigations and deliverations of the grand jury are in secret. Says the authority quoted above further on this point:

> **"Sec. 39. Secrecy of proceedings**
>
> "It has long been the policy of the law, in furtherance of justice, that the investigations and deliberations of a grand jury should be conducted in secret and that, for most intents and purposes, all its proceedings should be legally sealed against divulgence. The reasons for this policy or secrecy are generally said to be: to protect the jurors themselves; to promote a complete freedom of disclosure by prosecutors; to prevent the escape of a person indicted before he may be arrested; to prevent the subornation of perjury in an effort to disprove facts there testified to; *and to protect the reputations of persons against whom no indictment may be found. The protection of the grand jury would amount to nothing if the citizen were first exposed*

> *to scandal and disgrace by a public examination of the witnesses on the part of the state in order* to see whether he ought to be tried in public on a criminal charge, without any right on his part to examine the state's witnesses, to offer to contradict them, to prove their bad character, or to be represented by counsel. . . .
>
> * * * * * * *
>
> **"Sec. 40.—Application of rule**
>
> ". . . And it has been stated that the state's attorney and his assistants, while not definitely sworn to secrecy, are just as much bound to preserve the secrecy of the grand jury proceedings as are the grand jurors themselves, and that the official stenographers attending the grand jury are as much bound to secrecy as is the state's attorney." (Emphasis added)

A United States Court of Appeals in the case *In Re Bart*, 304 F2d 631, 637 (1962), referring to the necessity to respect the secrecy of the grand jury said:

> "This consideration forbids disclosure of the names of persons under investigation by the grand jury. Secrecy in this particular shields the suspect and, at the same time, protects the investigation."

After calling up the Banner, *immediately* upon Mr. Merritt and Mr. Sasser bringing in Mrs. Brown's affidavit, in order to make sure that the accusation was publicized before the Executive Committee meeting the next day, Gen. Shriver followed up with his investigation. He never did put the matter in the hands of the grand jury so that it could investigate to find out whether there was any basis for indicting anybody. Asked about the results of his investigation when his deposition was taken January 14, 1975, General Shriver said that he found no further evidence that would be "useable in court." He said, "I

have no evidence that Mr. Taylor authorized the offer of a bribe." (Shriver Dep. p. 19)

A newspaper article, alleged in *McAllister v. Detroit Free Press Co.* (1889), 76 Mich. 338, 43 NW 431, 15 Am. St. Rep. 318, to be libelous, contained the statement: "A week ago, it will be remembered that a safe was cracked in Bothwell, and that $2,000 in money and about $30.00 worth of stamps were stolen. Yesterday two hard-looking citizens canvassed the entire business part of Windsor in the effort to sell stamps at half price. They at last tried to sell the stamps to Postmaster Wigle, who had them arrested. They were searched at the station, and upon one of them was found $30.00 worth of stamps. They gave their names as Edward H. McAllister (plaintiff) and Lester B. French. Chief Bains will hold them to await developments." In holding the newspaper company liable for publication of the article, inasmuch as it falsely linked two reputable citizens with safecracking, the court held that it was no defense that the implication was based upon the opinion of the chief of police (Bains) that the two men were safe-crackers. The court said:

> "The reporter of a newspaper has no more right to collect stories on the street, or even to gather information from policemen or magistrates out of court, about a citizen to his detriment, and publish stories and information as facts in a newspaper, than has a person not connected with a newspaper to whisper from ear to ear the gossip and scandal of the street."

In the Harvard Law Review article on Defamation (Vol. 69 at page 930) it is stated that:

> "A defendant's conduct will be held unreasonable if he uses words he should realize are not necessary to accomplish a privileged purpose, or if he is excessively vehement or spectacular in the mode of publication."

In a footnote, the article cites as the leading English case, *Adam v. Ward* (1917), A. C. 309, distinguishing matter in a communication which is not pertinent from excessive vehemence in making the communication, saying that the former is unprivileged as outside the privilege while the latter is evidence of malice for the jury. The footnote further cites *Warren v. Pulitzer Pub. Co.*, 336 Mo. 184, 78 S. W. 2d 404 (1934), where the defendant newspaper published in its Sunday magazine section describing the expulsion of a clergyman by his church on morals charges *six months before*. The court held that the mode of publication raised a jury question as to whether the privilege had been abused.

The case presented here is not one where Mrs. Brown and Mr. Sasser and Mr. Merritt were bringing charges relating to the discharge of the functions of the office of district attorney general. If it had been there might have been some justification for the district attorney to call up the press and make an announcement that he was launching an investigation. He would have the right to defend himself—to let the public know that he was properly performing the duties of his office. That, however, was not their object. Nor, was it his. After debating with Mr. Sasser and Mr. Merritt whether Mrs. Brown was believable, he made the decision that she was "credible enough" (like being a little bit pregnant) that this was a matter of "some considerable public interest" i.e., *if* anyone was undertaking to bribe folks to get on the Supreme Court, the public "ought to know about it." This was a clear abuse of Gen. Shriver's authority as public prosecutor. The *Banner* was bound to know that, too. Nearly everyone who has been through the eighth grade in school knows that in our system of justice every man is presumed innocent until proved guilty, that the grand jury is the governmental body to investigate charges of the commission of crimes and misdemeanors *in secret* until it decides that there is prima facie evidence of guilt strong enough to warrant an indictment and require the accused to appear in court for a

public trial where he will have the opportunity to cross-examine the state's witnesses and introduce evidence in his own behalf. The acts and conduct of General Shriver and the *Banner* were subversive of that system.

The announcement to the *Banner* of the fact of the accusation (which had not been investigated) and his purpose to launch an investigation was only a repetition of Mrs. Brown's defamatory charge. It was beyond the scope of duty and the powers of the district attorney and was not protected by even a qualified privilege. This Court should find and hold as a matter of law that the occasion was not privileged, giving rise in plaintiff's favor of what the United States Supreme Court in *Paul v. Davis*, 96 S. Ct. 1155, termed "a classical claim for defamation actionable in the courts of virtually every state. Imputing criminal behavior to an individual is generally considered defamatory *per se* actionable without proof of special damages." (p. 1159)

Plaintiff further says that the Banner added matter to the accusation of Mrs. Brown as relayed to it by General Shriver which was for the purpose linking the plaintiff more clearly with the alleged bribe offer, i.e. the last four paragraphs. Even if the occasion was privileged, these four paragraphs were not pertinent and were outside the privilege.

Petitioner says that the interests of society do not require that a newspaper should publish to the world a telephoned report from a prosecuting attorney that he was commencing to investigate information he has received of attempted bribery implying that a candidate for a party nomination to a seat on the Supreme Court was behind it. The law on this subject has been stated by the Vermont Supreme Court in *Lancour v. Herald and Globe Association, supra,* as follows:

> ". . . we do not regard a preliminary police investigation as a judicial proceeding or the publication of a statement made in the course thereof by the self-confessed perpetrator of a crime concerning an alleged accomplice as within the protection of a qualified privilege. Information of this nature given out by the police is not to be considered as a statement of facts developed on a judicial investigation or the statement of a fact resulting from a judicial investigation. Arnold v. Sayings Company, 76 Mo. App. 159, 181, 182. It has been held that reports made to police officers charging persons with crime are not judicial proceedings the publication of which are privileged. Jastrzembski v. Marxhausen, 120 Mich. 677, 79 N. W. 935, 937; McAllister v. Detroit Free Press Co., 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, 322; Billet v. Times-Democrat Publishing Co., 107 La. 751, 32 So. 17, 31, 58 L. R. A. 62, 66. In the last mentioned case it is said: 'Neither common convenience nor the interests of society require that the opinions, suspicions, and deductions of police and detective officers, whether reported in writing to their superior officers, or through the telephone to the newspapers, should be published to the world.' The principle is recognized in Cincinnati Gazette Co. v. Tinberlake, 10 Ohio St. 548, 78 Am. Dec. 285, 286; Butrows v. Pulitzer Publishing Co., Mo. App., 255 S. W. 925, 930; Williams v. Black, 24 S. D. 501, 124 N. W. 728, 731; Houston Chronicle Publishing Co. v. Tiernan, Tex. Civ. App., 171 S. W. 542, 546. And see McDermott v. Evening Journal Ass'n, 43 N. J. L. 488, 489, 39 Am. Rep. 606.

The defendant relies upon Williams v. Journal Co., 211 Wis. 362, 247 N. W. 435; McClure v. Review Publishing Co., 38 Wash. 160, 80 P. 303; and Kilgore v. Koen, 133 Or. 1, 288 P. 192. The Williams case had to do with the report of a grand jury, which at the time of the publication had been placed on file by the authority of the court and this was held to be a public statement made in a judicial proceeding, and therefore privileged under the Wisconsin

statute. The McClure and Kilgore cases involved publications of what the police had informed the defendants concerning the evidence connecting the plaintiffs with the alleged crimes, and in each instance there was held to be a qualified privilege. In the Kilgore case it was said (at page 196 of 288 P.) that the public was entitled to know whether there were reasonable circumstances upon which to base the arrest, and that the officers had the right to detail the circumstances and their theories based thereon, which it was proper for the defendant newspaper to publish.

No doubt it is desirable that the public may know that the police and other officials charged with the duty of detection and arrest for crime are acting upon reasonable grounds in the discharge of their function. But, weighing the social values involved, it seems better to confide in the diligence and discretion of such officials, rather than that any person should be subjected to unmerited obloquy through the publication of false accusations made to them in the course of their investigations, the tendency of which is, in the words of Ellenborough C. J. in Rex v. Fisher, 2 Camp. 563, 571, 'to prejudice those whom the law still presumes to be innocent and to poison the sources of justice.' And see, Borrows v. Bell, 7 Gray, Mass., 301, 316, 66 Am. Dec. 479. The public interest does not require that the right to enjoy a good name shall be made subservient to the right of free speech. State v. Colby, 98 Vt. 96, 102, 126 A. 510."

The Determination of Credibility Questions by the Court of Appeals

Petitioner says that he has shown by admissible, cogent and convincing evidence that the story about a "package deal" coming out of West Tennessee focused on the state attorney general position being the pawn that could push one candidate onto the

ticket and that petitioner was actively seeking the nomination by working a deal with the liberal element of the execution committee whereby Judicial Selection Commission member, Russell Sugarman, a black, would be made general if a "slate" was selected including him (petitioner) was a sheer fabrication by the editor and reporter of the *Banner*. Therefore, it cannot properly and reasonably be determined that there is no genuine issue of fact to be tried before a jury.

It is very significant that no other newspaper or news media published the *Banner's* story. The Court of Appeals held that there was an absence of "competent evidence" that the May 30 article was published with actual malice and that "a proper view" of the evidence reveals no support for the proposition that the article was published with actual malice. It commenced its examination of the record, however, with recognition of the rule that the party moving for summary judgment has the burden of showing that no genuine issue of material fact exists, and in ruling on the motion the court must view the record in the light most favorable to the motion's opponent.

It did not appear from the May 30 article itself that Cheek was the source of the particular statements alleged by the plaintiff in his complaint to be libelous of him. The defendant in its motion for summary judgment stated as one of the grounds that there was no genuine issue "as to any material fact on the issue of 'actual malice' and that it was entitled to judgment as a matter of law." The last paragraph of the motion was:

> "In support of this motion defendant submits herewith sworn affidavits and true and correct copies of sworn depositions of witnesses given in the case of Taylor v. Tennessee State Democratic Committee, et al., No. 79507-1 R. D. pending in the Chancery Court of Shelby County, Tennessee. These affidavits and depositions show as a matter of law that there was no actual malice by the de-

fendant in the publication of the two articles which are the subject of this cause of action."

The defendant when the motion for summary judgment was filed supported the motion by affidavits of Morrell and Long which, however, did not reveal the names of any "sources" other than those named in the article itself. As has been stated above, the defendant's attorney had written a letter to Judge Uhlian stating that it relied on its "sources" but by various shifts both in the Shelby County case and in this case had succeeded in preventing discovery by the plaintiff of any "sources" other than those named in the article itself. It relied upon a privilege under the Newsmen's Shield Law despite the provision in Section 2 of the act that it should not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information. (*TCA 24-113.*)

Since the defendant had put the deposition of Cheek in the record to support its motion, the plaintiff was certainly entitled to rely upon the *denial* of Cheek that he was a source of the information in question in opposition to the motion. The *fact* that the secretary of the Democratic Executive Committee had denied under oath giving the information to the *Banner* and further said he did not believe that it was true was admissible in evidence to rebut the claim asserted in the affidavits of Morrell and Long of the "extensive investigation" and good faith in publishing the particular statement.

The Court of Appeals could not disregard this *fact* by terming it evidence that was not "competent." It, therefore, fell foul of it and disposed of it by holding as a *matter of law* that "a jury could not be permitted to credit the first deposition of Cheek to the exclusion of all evidence conflicting with it," and saying further:

"The testimony in his second deposition is corroborated by that of Morrell and Long, while the testimony of his first deposition is uncorroborated. Thus, there exist both explanation and corroboration, but both point in favor of the veracity of Cheek's second deposition, the existence of a reasonable source for the article, and the absence of an issue of material fact with regard to actual malice." (App. pp. A-11-12)

The Court of Appeals, of course, committed manifest error in deciding the question of credibility as to Cheek's testimony by rejecting the first and upholding the second, and improperly held that there was no genuine issue of fact in the case, because:

a) The direct and circumstantial evidence in the record, taken in the view most favorable to plaintiff's contentions, brought the case under the rule stated by the U. S. Supreme Court in *St. Amant v. Thompson, supra,* it being shown by the testimony of Mr. Morrell that the story was "the product of his imagination" and there being "obvious reasons to doubt the veracity of his informant and the accuracy of his report." Long having failed to obtain any confirmation of the story from the persons he interviewed. (See depositions of Gorrell, Drue Smith, Gilbert S. Merritt, William Peeler, John W. Wade and Edward H. Gillock) Long, having said in the article that Gillock "reportedly said there was a deal being made among committee members", this, as we pointed out in the Statement of the Case at page 12, being the only indication in the article itself as regards the source of the information about a deal, Long brought discredit upon himself by admitting in his deposition that he talked with Gillock and Gillock refused to make any statement except that which he was quoted as saying. (Long dep. 2/19/76, pp. 23, 27)

b) The Court of Appeals improperly weighed the evidence and determined the credibility questions—following an invalid

process of reasoning and misapplying the "cancelling out" rule in doing so, as we will now make plain.

First, the defendant said that Cheek was the source of information of the story in question.* But Morrell's and Long's testimony to this effect was contradicted by the deposition of Cheek which it also filed and relied upon. In an attempt to remove this conflict, the defendant procured a change in Cheek's testimony. They got him to say that he did recall talking to Morrell about wheeling and dealing and he may have said that Taylor could be the one who was doing it, if Morrell asked him; he just couldn't remember much about the conversation.

Petitioner by petition to rehear pointed out that nothing in Cheek's "refreshed" recollection contradicted his first testimony that he couldn't or wouldn't have given information to the *Banner* about such a deal involving Taylor and Sugarman because he was not of that opinion. So the Court of Appeals in denying the petition to rehear wrote an opinion in the form of an order saying, in effect, that they did not ignore Cheek's first deposition and "import absolutely verity" to the second, and saying further

> "Rather, we assumed that his inconsistent statements had the effect of 'cancelling each other out,' which left us with the testimony of Morrell and Long that Cheek was their source . . ." (App. pp. A-1-26)

The Court of Appeals assumed, apparently, that Cheek's first testimony was cancelled out *in its entirety* by his second testimony. In fact the only real material inconsistency between the two was that when he first testified he did not recall talking to Mr. Morrell. On his second deposition he recalled a luncheon meeting with Morrell. The material fact in issue was what

* The Court of Appeals at one place (App. A, pp. A-1-26) referred to Cheek as "one of the sources of the May 30 article" but at App. A, pp. A-1-26 referred to the fact Morrell and Long testified he was the "only source."

information did he communicate that might have justified the *Banner* in stating as a *fact* in the May 30 article that there was a deal coming from West Tennessee involving the attorney general position and to give the *Banner* any reasonable ground for saying that "possibly" it was a deal between Taylor and Mr. Sugarman, etc. On that particular point, neither Morrell nor Cheek testified that he furnished such information. Considering Cheek's deposition in its most favorable light to the *defendant*, he allowed Morrell to draw him into the field of speculation. We will not extend the argument further on this point deeming that it has already been covered by quotations from the depositions.

We believe the application given to the "cancelling out" rule here, i.e. to wipe out Cheek's first testimony in its entirety, without examining it alongside his second deposition to ascertain exactly what statements in the second contradict the first, is not sustained by any of the authorities cited by the Court of Appeals. (App. p. A-11) The rule was carried to its farthest point in *De Grafenreid v. Nashville Ry. & Light Co.*, 162 Tenn. 558, 39 S. W. 2d 274. In that case the Court held that it was not reversible error for the judge to charge the jury as follows:

> "If a witness has testified to a certain fact at one time, and at another time testifies differently regarding the same fact, then the latter statement nullifies the former, and the testimony of the witness as to that particular fact amounts to no testimony.

The Court stated:

> "The language of the trial judge herein which is complained of its, after all, merely a statement of a result which must necessarily follow, whatever the relationship of the witness to the litigation. Two sworn statements by a single witness are introduced by consent of counsel which are in

direct conflict. No effort was made to introduce any explanation. Whether the trial judge so charged or not, the one statement did off set and nullify the other. Ordinary rules of procedure for impeachment of a witness hardly apply.

* * * * * * *

. . . We think it clear that if this request had not been charged, the jury would not and could not have given to testimony by the same witness, so directly in conflict, any determinative weight. *And it is to be observed that the charge was properly and expressly restricted in its application to 'that particular fact' as to which the testimony was in conflict."* (Emphasis added)

Moreover, if the "cancelling out" rule must be applied as a *matter of law,* as the *Court of Appeals* held to cancel out Cheek's testimony, Morrell's testimony would be cancelled out, too; for his testimony on the material point of what Cheek told him was more inconsistent than Cheeks. (*Supra,* pp. A-28-30)

c) Mr. Morrell and Mr. Long gave conflicting testimony about material facts, as shown below:

Morrell	**Long**
Immediately after his meeting with Cheek a week or ten days prior to May 30th, he assigned Cheek to investigate the story. (Morrell dep. p. 8)	Morrell told him he had heard from Cheek that there was "some talk about maneuvering to get the judicial nominations and that it might be a good story to check into." (Long dep. p. 15)
He talked with Long, two, three or four times during the process of his work. (Dep. p. 8)	He went to work on the assignment the very same day. (Long dep. p. 19)

Long had to contact a fairly large number of executive committee members and others" (p. 8)	He could not recall if the story appeared in the paper the same day or the next day. He believed it was the next day, but could "not attest to it." (Long, p. 19)
He was aware of the extensive investigation conducted by Long. (Affidavit)	He worked on the story all day one day and believed he worked on it some the next day. (Long, p. 20)
He approved the article before publication. (Dep. p. 9)	The only committee members he contacted were Cheek and Borod. (Long, p. 36)*

d) Mr. Morrell's credibility was put in issue by the publication of a knowingly false news article about plaintiff's affidavit in this very case. (See motion of plaintiff and copy of news article, Rec. Vol. I, pp. 108-109, defendant's motion to strike, which was not ruled on by the court below; affidavit of Fyke Farmer filed December 3, 1976, par. 10 and Exhibit "J" to said affidavit, in Record in separate envelope; Morrell dep. November 9, 1976, pp. 8-10)

The plaintiff, on the authority of Bynum v. Miller, 136 Tenn. 593, 191 S. W. 128, says that this matter is admissible in evidence for the purpose of reflecting on the credibility of Mr. Morrell.

e) Mr. Morrell, until Mr. Neal put the words in his mouth, was unable to recall Cheek's exact words and said that he got from him the information that there was a lot of wheeling and

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* Plaintiff says that no information procured by Long as the result of the investigation furnished justification for the editor of the *Banner* to approve the accusation against him contained in the article.

dealing going on. He said his conversation with Cheek was "rather general." (*Supra*, p. A-29)

f) Long's testimony about his interviews with Frank C. Gorrell, Senator Edgar H. Gillock, Drue Smith, Senator William Peeler and Dean John H. Wade was disputed by each of them.

g) The story about the "deal" was so inherently improbable that Kenneth Morrell, editor of the *Banner* could not have believed it.

h) Mr. Morrell has never made oath that he believed that this particular part of the article was true—and that was the central point of the article.

i) Cheek's testimony on his second deposition after his memory had been "refreshed" shows how Morrell instigated the story implicating plaintiff. Cheek said "It may be possible that Mr. Morrell asked me if Judge Taylor could have been involved in it. . . ." (*Supra*, p. A-36) Mr. Morrell's testimony is consistent with Cheek's to a point. He said, "Mr. Cheek made reference to the fact that there was maneuvering going on, and so *I pursued a line of questioning with him*. . . . I was trying to find out all I could find out, of course, about how it was going, and who was doing what, was anybody promising anything, and got from him the information that there was a lot of wheeling and dealing going on, or maneuvering, or words to that effect." (*Supra*, p. A-28, emphasis added)

j) When plaintiff took Mr. Cheek's deposition on January 14, 1975, he endeavored to take Mr. Morrell's and Mr. Long's deposition at the same time, but the *Banner's* attorney, Mr. James F. Neal, objected and claimed a privilege against the disclosure of the sources for the *Banner's* article. Both Mr. Neal and Mr. George E. Barrett, attorney for the Executive Committee, heard Mr. Cheek's denial that he gave the *Banner* any information.

k) With knowledge that Cheek had given sworn testimony that he did not give information to the *Banner* other than the

statements discounting the possibility of any dealing involving the attorney general's post, Mr. Neal filed an answer on behalf of the *Banner* pleading the truth of the article as a defense.

l) At about the time of the filing of the answer, Mr. Neal, according to his statement to the Court below talked with Cheek and Cheek reaffirmed his testimony that he gave no information to the *Banner*.

m) Mr. Neal, after he had talked to Cheek and learned that Cheek was standing on his testimony given when his deposition was taken in January, 1975, denying that he gave any information to the *Banner* about the "package deal" coming from West Tennessee and involving Taylor and Sugarman, filed a motion for summary judgment basing the motion on Cheek's first deposition making the *denial*—imagine!

n) Mr. Neal, as the *Banner's* attorney nevertheless continued to claim a privilege on behalf of the *Banner* both in the Shelby County case and in the present action against it from having to disclose its sources of the information contained in the article.

o) Mr. Neal sought consent from Mr. Frank C. Gorrell to his being named as the source. When Mr. Gorrell denied having any conversations with either Mr. Morrell or Mr. Long on the subject, Mr. Neal asked him if he objected to them naming him anyway.

p) Mr. Morrell, in his affidavit filed in support of the motion for summary judgment did not state that he initiated the story because of information given him by Cheek but indicated that the information was turned up as the result of an extensive investigation by Long.

q) Mr. Morrell, upon being first examined by plaintiff's counsel and asked what knowledge or information he had concerning the subject of the article when he made the assignment to Mr. Long, gave the following answer:

"There are really three areas, I guess, Mr. Farmer, of my knowledge on this. One area, first hand knowledge, and secondly general knowledge that there was going to be a selection process, or there was going to be an election, *and the third area of knowledge involved in the interrogatories on matters that developed really as a result of the investigation of counsel.* (Emphasis supplied)

Q. By counsel?

A. By our counsel."

Morrell deposition filed May 12, 1977, p. 5.

The investigation of counsel, James F. Neal, for the *Banner* was not commenced until subsequent to the filing of the *Banner's* answer and plaintiff's subpoenaing of Morrell and Long to give discovery depositions in this very case. Mr. Neal at this juncture of events telephoned Mr. Cheek. The date was July 2, 1975. (*supra* p. 49) When this case was made Cheek's statements to Mr. Neal were consistent with his first deposition. (p. 49). It, therefore, was proven that Mr. Morrell's "third area of knowledge" was not developed until after this action was brought and plaintiff had initiated his discovery. Prior to that "investigation" by the *Banner's* attorney, Mr. Morrell had only the first and second areas of knowledge, viz., "there was going to be a selection process, or there was going to be an election." It was truly an amazing admission made by the *Banner's* editor!

Even if the Banner's Editor and Reporter Had Not Been Impeached and Contradicted, Since They Were Interested in the Result of the Case, Their Credibility Presented an Issue of Fact for the Jury.

The Court of Appeals finally, in its opinion denying the petition for a rehearing said that they were "left" with the

testimony of Morrell and Long that Cheek was their source for the disputed statement in the article of May 30, 1974. On this basis, having treated Cheek's inconsistent statements as "cancelling each other out," they held that there was no disputed issues of fact for the jury to decide.

It is a well settled rule, both in Tennessee courts and in the Federal courts that, aside from the question whether a fact issue of credibility is presented, where an uncontradicted and in no way discredited witness gives testimony which, if accepted, controls the case, if the witness has a personal interest in the result, his credibility must always be regarded as involving an issue of fact which must go to the jury.

This has been held to be the law in Tennessee in an opinion of the Court of Appeals for the Middle Section (cer. den.) written by Judge Felts in the case of *Poole v. First National Bank* (1946), 29 Tenn. App. 327, 196 S. W. 2d 563. In that case the question was whether a decedent had made a new promise to the bank to pay his note. Witnesses who were interested, being officers of the bank, were allowed to testify to statements by the decedent to make out a new promise. They were not contradicted by any other witness in what they said the decedent said to them. Nor could they be by the decedent since death had silenced him. The trial court directed a verdict on the basis of this uncontradicted evidence. But the Court of Appeals reversed finding that there were circumstances which reflected upon the testimony of the witnesses and that they were interested witnesses and held as a matter of law that a verdict may not be directed upon the testimony of an interested witness, declaring:

(14) And since the general abolishment of interest disqualification of witnesses, it has generally been held that interest alone is enough to make a witness's credibility a question for the jury, and that a verdict may not be di-

rected upon the testimony of an interested witness, even though he is not contradicted, impeached, or discredited.

This rule was declared by this Court in *Sonnentheil v. Moerlein Brewing Co.*, 172 U. S. 401, 408, 19 S. Ct. 233, 43 L. Ed. 402. The Court of Appeals for the Sixth Circuit in *Spero-Nelson v. Brown* (Ohio), 175 F.2d 86, 90, declared:

> The fact that a witness is interested in the result of the suit is sufficient to require the credibility of his testimony to be submitted to a jury as a question of fact. Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 408, 19 S. Ct. 233, 43 L. Ed. 492.

See also annotation on the subject, Interest of witness as requiring submission to the jury, in *62 A. L. R. 2d 1191, 1198.*

The decision in *Poole v. First National Bank of Smyrna* and the *A. L. R. 2d* annotation were cited in petitioner's brief to his petition for certiorari filed in the Supreme Court of Tennessee.

How the federal questions were timely and properly raised in the state courts

The Circuit Court of Davidson County in which the action was brought sustained the defendant's motion for a summary judgment stating in a Memorandum Opinion that:

> "While summary judgment is not a trial by affidavits and depositions, it is an appropriate procedure where the publication is one to which the constitutional privilege applies and where the plaintiff, after extensive pretrial discovery, has produced no independent evidence that the defendant knew the material published was false or entertained serious doubts about its veracity.

> "This case, just as *New York Times* and related cases, necessarily entails striking a proper balance between the State's interest in protecting the individual reputations of its citizens and freedom of expression protected by the Tennessee Constitution and the First Amendment to the U. S. Constitution."

Petitioner filed a timely petition to rehear setting up his claim to Federally protected rights, (Appendix E, p. A-31) supported by a brief. (Appendix F, p. A-35) The petition to rehear was overruled and petitioner appealed to the Court of Appeals, the intermediate appellate court. (Appendix G, p. A-37)

Petitioner, in his assignments of error in the Court of Appeals asserted that the dismissal of his action by the circuit court amounted to a denial and violation by state action of his Federally protected rights. (Appendix H, p. A-38) Attention is called especially to Assignment IV.

The Court of Appeals dealing particularly with Assignment IV held that the trial court followed proper summary judgment procedure on all issues on which its decisions were affirmed in the Opinion (Court of Appeals). No mention or note was made of petitioner's claim that the decision infringed on his rights under the United States Constitution particularly stated in Assignment IV. (Appendix A, p. A-17)

Petitioner in his Petition for Certiorari filed in the Supreme Court seeking a review of the judgment of the Court of Appeals assigned as error specifically that the Court of Appeals erred in denying his claim to a Federally protected right expressed in his Assignment IV in the Court of Appeals, quoting the exact wording of the claim. (Appendix I, p. 40)

The Supreme Court merely denied the petition for certiorari without opinion. (Appendix D, p. A-30)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The state court has decided federal questions as to the rights claimed by the defendant under the First and Fourteenth Amendments as these amendments have been interpreted and applied in *The New York Times v. Sullivan* and its progeny so as to deprive petitioner of his constitutionally protected rights under the Seventh and Fourteenth Amendments to have a jury decide whether the defendant, by departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers, published statements defamatory of petitioner by the knowing use of falsehoods or at least a reckless disregard of whether the statements were true or false.

In so deciding the state court had decided federal questions of substance not heretofore determined by this Court, or has decided them in a way not in accord with applicable decisions of this Court.

The questions presented are of great public interest and importance because, as *The New York Times* said in an editorial a few days after the Court's rulings on March 23, 1976,

> ". . . diluting the Bill of Rights and shutting the courthouse doors on citizens who have legitimate constitutional grievances is not only the worst way to cut down on the courts' caseload, but also a serious erosion of American democracy."

CONCLUSION

(additional question presented for review)

As an additional question presented for review—unless it is fairly comprised by the previous statement—petitioner says

that inasmuch as the Court of Appeals held that the trial court granted petitioner's motion for leave to file a second amendment to his complaint and that this amendment was for practical purpose an averment of the same cause of action asserted in his first amendment, i.e., a common law action on the case for damage by written or oral falsehoods that are not defamatory, if they are maliciously published and as calculated to produce, and do produce damage, a different action than one for libel or slander, it should have remanded the case for trial of this cause of action, irrespective of whether the two articles or either of them were non-defamatory.

This was the ground for Assignment V in the Supreme Court of Tennessee. (See Appendix I)

Wherefore, petitioner says the petition for certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX A

Court of Appeals of Tennessee
Middle Section at Nashville

Robert L. Taylor,
Plaintiff-Appellant,
vs.
Nashville Banner Publishing Company,
Defendant-Appellee.
} Davidson Law.

Appealed from the Second Circuit Court for
Davidson County, Tennessee

The Honorable Hal Hardin, Judge

Filed: March 31, 1978

FYKE FARMER, 1122 Stahlman Building, Nashville, Tennessee 37201, Attorney for Plaintiff-Appellant.

JAMES F. NEAL and JON D. ROSS, Neal & Harwell, 800 Third National Bank Building, Nashville, Tennessee 37219, Attorneys for Defendant-Appellee.

AFFIRMED

FRANK F. DROWOTA, III,
Judge.

OPINION

This is an appeal by plaintiff, a public figure, from a summary judgment dismissing with prejudice his libel suit against defendant newspaper.

Plaintiff Robert L. Taylor is a well-known attorney, a former Chancellor, and a former judge of the western section of this Court. He once unsuccessfully sought the Democratic nomination for governor of Tennessee. In the spring of 1974, he was an active candidate for the Democratic nomination to the Supreme Court of Tennessee. Defendant Nashville Banner Publishing Company (Banner), one of two daily newspapers in Nashville, published two articles containing material allegedly defamatory of plaintiff on May 30 and May 31, 1974. The articles dealt with events surrounding the selection of Democratic candidates for the Supreme Court.

The Tennesssee Supreme Court is composed of five judges, "of whom not more than two shall reside in any one of the grand divisions of the State." Tennessee Constitution Art. 6, § 2. Supreme Court judges are to be "elected by the qualified voters of the State" according to such rules as the legislature prescribes. Tennessee Constitution, Art. 6, § 3. Article 6, § 5 of the State Constitution provides that the judges of the Supreme Court shall appoint the Attorney General of the State. By tradition, the Attorney General is appointed from the one grand division, east, middle, or west, that is represented by only one Supreme Court judge.

At one time, judges of all the appellate courts of this State were chosen by means of a merit selection plan. This plant, set out in T.C.A. §§ 17-701-17-716, provides for the governor to fill judicial vacancies by appointing one person from a group of three recommended by the appellate court nominating commission, a body established by the statute. The appointee then appears on the next general election ballot to be accepted or rejected by the voters on a "yes/no" basis. While this system still applies to intermediate appellate courts, the legislature in 1974 excepted the Supreme Court judges from its operation. The result is that Supreme Court judges are selected in popular, contested elections much like holders of political offices in the executive and legislative branches of government.

In the spring of 1974, the State's political parties were anticipating the election of Supreme Court judges to be held in August of that year. The Tennessee State Democratic Executive Committee, which was to choose its party's five nominees for the Court, had scheduled a meeting in Nashville for that purpose for June 1, 1974. The Committee had received from a special Judicial Selection Commission the names of eight people recommended as qualified for the Court. Plaintiff Taylor's name was not one of the eight names submitted. The Executive Committee was not absolutely bound to choose its five nominees from among the eight recommended, however, and plaintiff remained an active candidate.

In the context of this political nominating process, the Banner published the first story of which plaintiff complains on May 30, 1974. The gist of the story was that a great deal of political maneuvering was occurring in Democratic ranks with respect to the Supreme Court nominations. In the part of the story particularly complained of by plaintiff, and alleged to be defamatory of him, it is stated that plaintiff was actively seeking the nomination, "possibly by working a deal with the liberal element of the executive committee whereby . . . Russell Sugarman, a black, would be made attorney general" if plaintiff were nominated to the Court. The entire article is reprinted in an appendix to this opinion, and is further discussed below.

On May 31, 1974, the day before the Executive Committee meeting, the Banner published the second article of which plaintiff now complains. The article told of bribery charges lodged with the District Attorney General in Nashville by a member of the Democratic Executive Committee. The Committee member, it was reported, "said an attempt was made this week to 'buy my vote' for Memphis Attorney, Robert Taylor" by an unidentified man and woman. The article went on to describe in detail the attempted bribe, the Committee member's refusal, and her filing of a statement with District Attorney General

Shriver, who was said to be investigating the matter. The entire article is reproduced in the appendix to this opinion.

At the June 1 meeting, the Executive Committee chose its five nominees from the list of eight recommended. Plaintiff was not one of the five chosen. All five Democratic candidates were successful in the August election, and they constitute our present Supreme Court.

On May 27, 1975, plaintiff brought the instant libel suit against the Banner in Davidson County Circuit Court, alleging that the articles of May 30 and 31, 1974, defamed him. Plaintiff claimed in his complaint that the articles injured his reputation and resulted in his failing to get enough Executive Committee votes for nomination. He asked $500,000.00 in compensatory and punitive damages. The complaint was amended, in March of 1976, to allege that the articles were published "maliciously," that they were "calculated by the defendant to injury plaintiff's candidacy for nomination," and that they "did produce actual damages to the plaintiff by causing him to fail to secure enough votes."

Defendant Nashville Banner took the position that the constitutional privilege first established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applied, and that there was no evidence of "actual malice" as defined in that case. On October 8, 1975, defendant filed its motion for summary judgment. Two grounds for dismissal were asserted: (1) that the language complained of is unambiguous and not defamatory; and (2) that there is no genuine issue of material fact on the issue of actual malice. In support of its motion, defendant attached certain affidavits and depositions. The depositions were ones taken early in 1975 in the case of *Taylor v. Tennessee State Democratic Executive Committee*, a suit brought by plaintiff in the Chancery Court for Shelby County. Because it perceived the case as a serious and unusual one, the trial court permitted the parties to engage in very extensive discovery over

a long period of time before ruling on the summary judgment motion. Further discovery consisted in large part of new depositions, including fresh testimony from some of those whose depositions in the Chancery case had already been submitted.

On January 5, 1977, the trial court filed a lengthy memorandum opinion in which it sustained defendant's motion for summary judgment on all grounds as to both articles. The opinion contains an orderly and thorough presentation of the facts, and an accurate and extensive discussion of applicable law. It also embodies the court's conclusion that the articles in question are not defamatory of plaintiff, and that there is absolutely no evidence to indicate that plaintiff could prove that defendant published them with "actual malice" within the meaning of *New York Times Co. v. Sullivan, supra.* In accordance with this opinion, the court on January 7, 1977, entered an order granting defendant's motion for summary judgment and dismissing the case. Plaintiff has appealed.

Plaintiff has raised five assignments of error in this Court. In the first, plaintiff complains of the trial court's conclusion that the articles are not defamatory of him. In the second assignment he disputes the conclusion that there is no genuine issue of material fact on the question of actual malice. In the third assignment plaintiff alleges that the trial court erred in refusing to allow him to amend his complaint, while in the fourth he complains that the trial court improperly weighed the evidence and determined the credibility of the witnesses. In the fifth assignment of error plaintiff simply avers that the trial court erred in granting summary judgment. We will examine the May 30 article in the light of the first two assignments of error, and then proceed to treat the May 31 article in the light of the same two assignments. Finally, we will examine plaintiff's third, fourth and fifth assignments of error.

Summary judgment is to be rendered by a trial court only when it is shown that "there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." T.R.C.P. 56.03. The summary judgment procedure is not to be regarded as a substitute for trial of disputed factual issues. *Evco Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975); *Layhew v. Dixon*, 527 S.W.2d 739 (Tenn. 1975). The party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists, and in ruling on the motion the court must view the record in the light most favorable to the motion's opponent. *Lucas Brothers v. Cudahy Co.*, 533 S.W.2d 313 (Tenn. App. 1975). With this standard in mind, we turn to the merits of plaintiff's appeal.

THE ARTICLE OF MAY 30, 1974

In his first assignment, plaintiff contends that the trial court erred in concluding that the article of May 30, 1974, is not defamatory of him. Plaintiff points especially to the sixth paragraph of the article. The first six paragraphs read as follows:

> Intense political maneuvering that has been termed by one insider as "a hell of a lot of dealing" may determine the nominations for the State Supreme Court.
>
> Jockeying, dealing and political pressure are all part of the picture as candidates are attempting to be selected by the State Democratic Executive Committee for the five slots on the ticket for the high court.
>
> The 36 member committee meets here Saturday to narrow a list of eight candidates recommended by the Judicial Selection Commission to five nominees.
>
> But there are some other persons with hats in the ring. And through these persons, deals are being discussed. A "package deal" coming out of West Tennessee focuses on the state attorney general position as being the pawn that could push one candidate onto the ticket.

> Indications from Memphis are that former chancellor Robert L. Taylor is attempting to get enough votes to overthrow the recommendation of Justice William H. D. Fones.
>
> Taylor is actively seeking the nomination possibly by working a deal with the liberal element of the executive committee whereby Judicial Selection Commission member Russell Sugarman, a black, would be made attorney general if a "slate" is selected including Taylor.

Plaintiff's primary argument is that the article charges him with a crime, which of course would make it clearly defamatory. Plaintiff alleges that the article charges him with the crime of bribery, citing T.C.A. § 2-1927. It is doubtful, but arguable, that the conduct attributed to plaintiff by the article is proscribed by that statute.

Furthermore, although plaintiff has not raised the point, this Court recognizes that the May 30 article may easily be understood as charging that plaintiff was guilty of conduct contrary to accepted and published standards of conduct for candidates for judicial office. During May, 1974, the conduct of judges and candidates for judicial office was governed by Rule 38 of the Supreme Court of Tennessee, which then read in part as follows:

> The ethical standards relating to the administration of the law in this Court, shall be the Canons of Judicial Ethics of the American Bar Association now in force, and as hereafter modified or supplemented.

Candidacy for judicial office was specifically governed by Canon 30 of the Canons of Judicial Ethics of the American Bar Association, which read in pertinent part:

> A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appoint-

> ing or electing power . . . and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

It may be that the May 30 article in effect charges that plaintiff violated this ethical provision by promising to support and vote for Mr. Sugarman as Attorney General if plaintiff were nominated and elected to the Supreme Court. If so, this is a powerful argument in favor of the conclusion that the article is defamatory.

On the other hand, it could be argued that the article must be considered in the context of the politics surrounding major party nominations for high state office, a context clearly delineated in the article as a whole. It is not customary to consider judges and candidates for judicial office in the context of such partisan politics. The judicial function is to interpret and apply the law and to administer justice in a manner that is independent of all considerations save fairness and logic. It is primarily for this reason that the conduct of judges is restricted by many rules, such as the Canons of Judicial Ethics referred to above, which do not bind those in the legislative and executive branches, the function of whose members is to formulate into law and carry out the subjective wishes of the people who elect them. Nevertheless, partisan politics is the context in which candidates for the Supreme Court in 1974 were placed by the use of a "popular election" as the selection process for Supreme Court judges. In such a political context, the disgrace involved in the type of "dealing" attributed to plaintiff in the May 30 article is arguably less than would otherwise be the case with a candidate for judicial office under the "merit" form of selection. This is particularly true when, as here, the alleged deal involved the selection of Attorney General, which is in the nature of an administrative rather than a judicial function of the Supreme Court.

Of the three members of this panel, Judge Todd feels strongly that the May 30 article is defamatory, primarily on the ground that the article in effect charges plaintiff with violating Canon 30, *supra*. Contrary to the statements in his separate concurring opinion, however, the other two members of this panel neither condone violations of the Code of Judicial Conduct nor would we be unwilling to condemn such violations in a proper case. In this case we simply feel that since the trial court's judgment in defendant's favor must be affirmed with regard to the May 30 article on the issue of actual malice, discussed next, it would serve no useful purpose to reach a conclusion on the issue of whether that article is defamatory. Accordingly, we pretermit any further discussion of the facts or law related to this issue.

Plaintiff's next argument is that the trial court erred in concluding that there exists no genuine issue of material fact on the question of whether defendant published the May 30 article actual malice. We disagree. We hold that, due to the absence of competent evidence that the May 30 article was published with actual malice, defendant's publication of it is protected by constitutional privilege.

Constitutional privilege was first articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), wherein the Court held that a plaintiff who was a public official could not recover for defamatory statements relating to his official conduct unless he could prove that they were published with "actual malice," defined as knowledge of the statements' falsity or reckless disregard for whether they are false or not. 376 U.S. at 279-80. This rule, based on the First Amendment guarantees of free expression, was soon extended to apply to public figures who are not public employees in cases such as *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The Court has defined "reckless disregard" as a "high degree of awareness of probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). In this regard, the Court has also stated that

> (t)here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

In the instant case, plaintiff does not deny that he is a public figure for purposes of the *New York Times* doctrine. Rather, he argues that the inconsistent depositions of Will Cheek, when viewed in the light most favorable to him, raise an issue of material fact as to actual malice.

It was the testimony of both Ken Morrell, defendant's editor, and Ed Long, its reporter, that Will Cheek, the Secretary of the State Democratic Executive Committee, was the only source for the May 30 article's connection of plaintiff with a "deal" involving the office of Attorney General. The record contains two depositions of Cheek's, one taken on January 14, 1975, and the other on April 1, 1976. In the first deposition, Cheek categorically denied that he passed on to anyone a rumor that plaintiff was involved in such maneuvering as the article reported, stating that he did not believe that plaintiff was so involved. In the second deposition, taken more than a year later but after discussions with several people had allegedly refreshed Cheek's recollection, Cheek testified that he had "speculated" about plaintiff to Ken Morrell, defendant's editor, along the lines reported in the article.

Plaintiff would have us allow for the possibility that a jury might believe only the statements in Cheek's first deposition to the effect that he never told defendant that plaintiff was involved in a "deal". Believing that, plaintiff argues, a jury could then disregard the additional testimony of Morrell and Long and conclude that defendant had no source at all for the May 30 article. On this conclusion, says plaintiff, a finding of actual malice might be predicated. This position, however, overlooks legal authority of long standing in Tennessee.

It is a rule of law in this state that contradictory statements of a witness in connection with the same fact have the result of "cancelling each other out." *DeGrafenreid v. Nash. Ry. & Lt. Co.*, 162 Tenn. 558, 39 S.W.2d 274 (1931); *Johnson v. Cincinnati N. O. & T. P. Ry. Co.*, 146 Tenn. 135, 240 S. W. 429 (1922); *Donaho v. Large*, 25 Tenn. App. 433, 158 S. W. 2d 447 (1941); *Southern Motors, Inc. v. Morton*, 25 Tenn. App. 204, 154 S. W. 2d 801 (1941); *Nashville & American Trust Co. v. Aetna Cas. & Sur. Co.*, 21 Tenn. App. 366, 110 S. W. 2d 1041 (1937).

> The question here is not one of the credibility of a witness or of the weight of evidence; but it is whether there is any evidence at all to prove the fact. If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies; but if the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way.

Johnson, supra, 146 Tenn. at 158, 240 S.W. at 436. As can be seen from the quoted paragraph, this rule of "cancellation" is usually stated as applying only when the inconsistency in the witness's testimony is unexplained and when neither version of his testimony is corroborated by other evidence. In the instant case, the inconsistency in Cheek's testimony is explained by his refreshed recollection. The testimony in his second deposition is corroborated by that of Morrell and Long, while the testimony of his first deposition is uncorroborated. Thus, there exist both explanation and corroboration, but both point in favor of the veracity of Cheek's second deposition, the existence of a reasonable source for the article, and the absence of an issue of material fact with regard to actual malice.

Under these circumstances, a jury could not be permitted to credit the first deposition of Cheek to the exclusion of all the evidence conflicting with it. To apply the rule of *Johnson, supra*, and disregard the inconsistent testimony of Cheek *in toto* is to view the evidence in a light as favorable to plaintiff as the summary judgment standard requires, and perhaps more so. Disregarding Cheek's inconsistent testimony, we are left with the testimony of Morrell and Long that Cheek related to defendant the substance of the story it published about plaintiff and the Attorney General "deal." With the only evidence indicating that the source of the story was the Secretary of the State Democratic Executive Committee, there is no doubt that there exists no genuine issue of material fact as to whether defendant published the May 30 article with knowledge of its falsity or with such reckless disregard for its truth or falsity as to constitute actual malice.

Since a proper view of the evidence reveals no support for the proposition that defendant published the May 30 article with actual malice, it follows that the trial court was correct in granting summary judgment in defendant's favor with regard to the libel claim based on that article.

THE ARTICLE OF MAY 31, 1974

Rather than reporting possible political "deals" connected with the Democratic nominations for the Supreme Court, the May 31 article discusses the much more serious matter of bribery. The thrust of the article, reproduced in its entirety in the appendix to this opinion, appears in its initial paragraph:

> A member of the State Democratic Executive Committee today said an attempt was made this week to "buy my vote" for Memphis Attorney Robert Taylor in Saturday's committee election for State Supreme Court nominees.

The article goes on to report that the Committee member was approached by two people who offered her "financing" if she would vote for plaintiff, and that she had informed the District Attorney General, who was investigating.

Again, plaintiff's first argument is that the trial court was wrong to conclude that this article is not defamatory. We cannot agree with plaintiff. It is true that the article clearly and unambiguously reports charges of bribery. But, just as clearly, those charges are not levelled at plaintiff. The article says that two people tried to buy a vote *for* plaintiff, not that plaintiff tried to buy a vote. In the context of the article, which nowhere even intimates a connection between plaintiff and the two unnamed persons who attempted the bribe, the quoted paragraph can only mean that a vote in favor of plaintiff was attempted to be bought, not that plaintiff was behind the attempt. This certainly cannot be construed as a defamation of plaintiff.

Moreover, defendant is clearly protected by constitutional privilege here. Again, plaintiff does not deny that he is a public figure for purposes of the *New York Times* doctrine. The trial court found that there was no issue of material fact on the question of actual malice, and we agree.

There is no question that a member of the Executive Committee went to District Attorney General Shriver with allegations of attempted bribery against two people, as the May 31 article reported. The record shows that defendant obtained information about these charges from Shriver himself. The existence of the allegations and the investigation is clearly documented. It is equally clear that the gist of the allegations made to Shriver was that someone had attempted to pay a member of the Committee to vote in favor of plaintiff's nomination. Indeed, the evidence unequivocally supports not only the proposition that the published report of the allegations was true, but also the proposition that the allegations themselves were entirely

true. Thus, defendant might well be entitled to an absolute defense at common law because of the truth of the matter published. At the very least, the substantial veracity of the May 31 article combined with the highly credible nature of its main source, the District Attorney General, supports the trial court's conclusion that, as a matter of law, plaintiff could not prove "actual malice" in the sense of *New York Times* and its progeny.

We hold that defendant's publication of the May 31 article was constitutionally protected as a matter of law because of the abseuce of any issue of material fact with respect to actual malice. The trial court's grant of summary judgment was correct, and must be affirmed on this basis. Our conclusion renders it unnecessary for us to consider plaintiff's rather lengthy arguments on other matters, such as the applicability of the non-constitutional privilege to publish comments on official proceedings.

ASSIGNMENT OF ERROR III

Plaintiff contends that the trial court erred in refusing to allow him to amend his complaint. The record shows that plaintiff did amend his complaint once by leave of court in March 1976, as we have noted above. The subject of this assignment of error, however, is a motion which plaintiff filed November 5, 1976, and which simply says, "The plaintiff Robert L. Taylor moves for leave to amend his complaint in this case." The substance of the proposed amendment is not attached, nor does it appear in the record at all until the very end, where it is attached to plaintiff's petition to rehear. Nowhere in the record is there a ruling of the trial court on the motion. The transcript of a hearing held on another motion on November 12, 1976, contains reference to a motion to amend by plaintiff, but again the substance is lacking and no ruling appears.

In these circumstances, it would be impossible for this Court to reverse the trial court for failing to allow the amendment, even if it were clear that the court did fail to do so. Unless the record before us shows the substance of a proposed amendment and that it was filed in the trial court, we cannot determine what was before that court or whether the court acted properly on the motion to amend. The proper way to request the court for leave to amend under Rule 15 is to attach a copy of the proposed amendment to the motion so that it becomes part of the record at that time, regardless of what action the trial court takes or fails to take on it. This procedure ensures that the appellate courts know exactly what amendment the trial court was asked to allow. It is only with such knowledge that the trial court's decision can be reviewed.

Even assuming that the amendment appearing in plaintiff's motion to rehear was before the trial court as plaintiff contends, however, plaintiff has not been prejudiced in regard to it. First, while the trial court never expressly ruled on the motion to amend, the memorandum opinion indicates that the amendment was not denied but was considered by the court. The memorandum states that "(e)very indulgence has been allowed the plaintiff, including amendments to the complaint . . ." (emphasis added). Since only one amendment, which was allowed, appears in the record, the inference is that the trial court considered that plaintiff's second motion to amend had been granted.

In addition, plaintiff would not have been unfairly prejudiced even had his second motion to amend been denied. The material factual allegations of the second amendment, as it appears in the petition to rehear, were already at issue. In the final paragraph of the proposed amendment, it is stated that defendant intentionally made false statements knowing they would injure plaintiff's chances of being nominated, and that the statements did result in his failure to be nominated. This

can be construed, at most, as an attempt to plead a cause of action in the nature of intentional interference with prospective advantage. This is the same construction that was placed on plaintiff's *first* amendment by defendant's amended motion for summary judgment, and the trial court expressly rejected such a cause of action in its memorandum opinion. Since the substance of plaintiff's proposed second amendment to his complaint was pleaded and considered, his case could not have suffered from denial of his second motion to amend had the trial court denied it.

At this point, we note our agreement with the trial court's grant of summary judgment in defendant's favor on the cause of action for intentional interference with prospective advantage. Plaintiff has presented no evidence to raise an issue of material fact on any of the elements of that tort in the instant case. See Prosser, *supra*, § 130. He has cited no authority in support of this cause of action, nor even any to show that such a tort is recognized in Tennessee. Further, insofar as we have held that the First Amendment protects defendant against a charge of libel in this case, it would also protect defendant against liability for this tort. Summary judgment was properly granted on this cause of action.

ASSIGNMENT OF ERROR IV

In this assignment, plaintiff contends that the trial court weighed the evidence and determined the credibility of witnesses, neither of which may properly be done in considering a motion for summary judgment. The only conflict in the evidence that is even arguably material, and the only evidence that could have been weighed or evaluated on the basis of credibility is the inconsistencies in the two depositions of Will Cheek. These inconsistencies involve what Cheek, one of the sources for the May 30 article, told the Banner in connection

with that article. We have already decided, however, that the most favorable view to plaintiff that we could possibly take of Cheek's inconsistent testimony is to disregard it altogether. This decision, fully explained above in our discussion of the issue of actual malice in the publication of the May 30 article, means that it is irrelevant whether or not the trial court weighed Cheek's inconsistent evidence on the issue of actual malice in the publication of that article. In no other instance could the trial court have weighed evidence or gauged credibility, for in no other instance was there any material evidentiary inconsistency capable of being so resolved. We hold that the trial court followed proper summary judgment procedure on all issues which have been discussed, and on which its decisions have been affirmed, in this opinion.

ASSIGNMENT OF ERROR V

Finally, plaintiff alleges that the trial court erred in granting defendant's motion for summary judgment and dismissing the case. For the reasons stated in this opinion we disagree, and affirm the judgment of the trial court.

Affirmed.

. . . . . .

FRANK F. DROWATA, III, Judge

Todd, J., concurs in a separate opinion.
Blackburn, Sp. J., Concurs.

Appendix A to Opinion

May 30, 1974, Nashville Banner Article

INTENSE DEALING COULD INFLUENCE COURT PICKS
By ED LONG

Intense political maneuvering that has been termed by one insider as "a hell of a lot of dealing" may determine the nominations for the State Supreme Court.

Jockeying, dealing and political pressure are all part of the picture as candidates are attempting to be selected by the State Democratic Executive Committee for the five slots on the ticket for the high court.

The 36 member committee meets here Saturday to narrow a list of eight candidates recommended by the Judicial Selection Commission to five nominees.

But there are some other persons with hats in the ring. And through these persons, deals are being discussed A "package deal" coming out of West Tennessee focuses on the state attorney general position as being the pawn that could push one candidate onto the ticket.

Indications from Memphis are that former chancellor Robert L. Taylor is attempting to get enough votes to overthrow the recommendation of Justice William H. D. Fones.

Taylor is actively seeking the nomination possibly by working a deal with the liberal element of the executive committee whereby Judicial Selection Commission member Russell Sugarman, a black, would be made attorney general if a "slate" is selected including Taylor.

East Tennessee has for years been the division with only one justice and the attorney general. The Supreme Court selects the attorney general.

The committee is composed of 18 men and 18 women. It is reported that Nashville lawyer Bonnie Cowan is seeking to get the support of the women of the committee.

Three of those recommended by the Selection Commission obviously will not be nominated, but it may be because they have been "cut out" of a deal.

State Sen. Ed Gillock of Memphis, who appeared before the commission as a candidate for the high court and was not recommended, reportedly said there is such a deal being made among committee members.

Gillock said that he is running for the Supreme Court nomination. He is busy contacting committee members to attempt to get their votes. "The situation is very, very fluid at this time and that's all I can say," the senator said.

One member, Ronald Borod, was targeted as the force behind Fones.

A Memphis lawyer and member of the committee, he said today, "I'm not interested in any deals or trading. I'm a supporter of Justice Fones and I'm interested in the other four seats.

"I'm not part of any move and I don't know about such a move."

Borod is a former law partner of Fones. He said that the justice is "trying to meet personally with the committee members."

Choose Slate

Sen. William Peeler, Waverly, said, "I think there's going to be an effort made to choose a date (sic) of candidates the panel selected.

"There will also be some candidates that will run who were not recommended by the commission. I would expect Bob Taylor would run regardless of what the commission did."

About the possibility of a deal between the candidates to also place a sixth person into consideration who would be named attorney general if a "package" was selected, Peeler said, "There's been some discussion along those lines. I don't know how serious the discussion have been."

The veteran lawmaker indicated that the candidates may be more interested in securing their own nominations than in selecting the attorney general.

Will Cheek of Nashville, secretary of the committee, said, "I haven't seen a block vote or 'slate' happen yet and I don't think it will because of the interpersonal relationship among committee members." He did say that all of the candidates had called him and sent letters to him as well as other members.

"Judges are aware that this type of dealing is illegal, not to mention unjudicial," Cheek said.

Method of Balloting

Gilbert S. Merritt, Jr., the legal counsel for the Judicial selection commission, and Cheek both said that the problem the committee will face Saturday will be in the method of balloting.

The committee will choose a nominee from each of the state's three grand divisions and two at-large candidates.

Merritt indicated that the order in which the candidates are chosen could be extremely important.

Two of the nominees said earlier this week that the important question will be the number of nominees from East Tennessee, which has traditionally only been represented by one justice. With three candidates, it may be that that section of the state will receive two justices in this election.

With only two candidates from West Tennessee, some observers have said that either Fones or Chief Justice Dyer will be dropped from the ticket if a "deal" is consummated.

The chairman of the Judicial Selection Commission, former Vanderbilt Law School Dean John Wade, said today, "I gather there has been some discussion" about the voting Saturday.

"It is not impossible for the candidates to get together but the members of the State Executive Committee would react adversely," Wade said.

In addition to Fones, Dyer and Cowan, those being considered are Nashville lawyer William Harbison, Chattanooga Chancellor Ray Brock, Pulaski lawyer Joe Henry, and Courts of Appeals Judges Charles O'Brien of Crossville and Robert Cooper of Knoxville.

May 31, 1974, Nashville Banner Article
Democratic Committeewoman tells of attempt to influence high court vote

SHRIVER PROBING BRIBE TRY

By LARRY BRINTON

A member of the State Democratic Executive Committee today said an attempt was made this week to "buy my vote" for Memphis Attorney Robert Taylor in Saturday's committee election for State Supreme Court nominees.

The charge was leveled by Mrs. Helen A. Brown, of 1811 Beech Avenue, and a detailed probe has been launched into the allegation by the staff of District Attorney General Thomas Shriver.

The State Democratic Executive Committee member said the alleged bribe attempt was made Tuesday at her home by a man and woman, whose names she could not recall, but could identify.

"How much financing would it take to get your vote," Mrs. Brown said the man asked her after she told him she had not made up her mind as to whom she would vote Saturday and he allegedly had suggested she vote for Taylor as one of five Democratic nominees.

"My vote is not for sale," the woman said she replied. Mrs. Brown said the answer "irritated" the woman, about 55 years old, who had originally telephoned her on May 23.

Election to Continue

James Sasser, chairman of the State Democratic Executive Committee, said the election will continue Saturday as planned.

"We plan to continue our meeting as planned and to nominate our Supreme Court justices," Sasser explained "I think this sort of attempt to influence voters is reprehensible, and shocking and I think Mrs. Brown is to be congratulated for coming forward."

The committee chairman said the nominees must be certified before the June 6 Democratic Primary election and the election must be held Saturday as planned.

Meantime, Shriver said his investigators began the probe this morning.

"We can't anticipate how long the investigation is going to take, but I doubt seriously it will be completed by Saturday," he commented.

The district attorney said he believed his investigators had learned the identity of the woman and expect to learn from her the man's identity.

Taylor could not be reached for comment. His Memphis law firm reported he was in Nashville for the weekend.

First Contact May 23

Mrs. Brown, serving her first term on the executive committee, said the woman had first contacted her by telephone May 23 stating she wanted to discuss the Davidson County Democratic Executive Committee with her.

"She said she wanted to talk to me about the election of a chairman for the county election committee and she said she also wanted to feel me out on some of the candidates that are coming up for the court nomination," Mrs. Brown told the Banner.

After discussing politics for a few minutes on the telephone, Mrs. Brown said it was agreed that the woman, who identified herself to the committeewoman, would visit Mrs. Brown said, referring to the continue the conversation.

"She came Tuesday, but she didn't say she was going to have anyone with her," Mrs. Brown said, referring to the man who told her he worked at the Metro Courthouse.

"She introduced herself, but I'm not very good on names," she commented. "He introduced hemself, also."

"We talked about the county executive committee and she said she didn't like the way things were being run, that people were telling you how to vote and who to vote for." Mrs. Brown recalled.

"I said that politics is kind of dirty and gets nasty sometimes," she added. It was then, Mrs. Brown said, that the unidentified man began naming some of the nominees for the justice posts on the State Supreme Court.

"They asked me who I was in favor of," she said. "I said nobody in particular right now and that my mind was not really made up since I had until Saturday morning to reach a conclusion.

"This man spoke up and said 'how do you feel about Taylor? I feel like he's the man for the job'."

Taylor Discussed

Mrs. Brown said she told the couple that she didn't favor Taylor over any of the other candidates.

"He said Taylor had done so much for the blacks in the Civil Rights movement." The committee member said they then discussed Taylor's role as chairman of Alabama Governor George Wallace's Tennessee presidential campaign bid.

"That's when he asked me 'How much financing would it take to get your vote', Mrs. Brown stated. After stating she wouldn't sell her vote, she said the man said, "I don't want to pressure you, but I wish you would think about it."

After turning down the alleged bribe attempt, Mrs. Brown said, the man "sort of smiled and tried to approach me at a different angle, but the woman called me 'hardheaded' and 'stubborn'."

Mrs. Brown said the man telephoned her Thursday, again identified himself, and inquired if she had changed her mind. The woman said she answered that she still had not decided how she would vote Saturday.

Mrs. Brown later contacted her attorney, Gilbert Merritt, who took a statement from her and turned it over to Shriver.

Taylor was one of a flock of Democrats who sought recommendation to the State Supreme Court by a special commission named by the Democratic Executive Committee.

The commission recommended eight persons, from which the executive committee can nominate five. Taylor was not one of the eight, but he still hopes to be one of the five nominees.

In its meeting Saturday, the executive committee is under no obligation to choose from the eight people recommended by the special commission.

Committee members privately have confided that the political infighting and dealing for the five posts have been fierce.

Separate Concurring Opinion

Although the majority opinion mentions my views on the impropriety of the actions alleged in the May 30, 1974, article, I am disappointed that my colleagues are unwilling to join me in unequivocally condemning actions prohibited by the prescribed ethical standards for the bench and bar.

The Code of Professional Responsibility adopted by the American Bar Association and by the Supreme Court of this State prior to May, 1974, provides:

> "D. R. 8-103, *Lawyer Candidate for Political Office.* A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 7 of the Code of Judicial Conduct."

The Code of Judicial conduct promulgated by the American Bar Association states:

> "B. Campaign Conduct.
>
> (1) A candidate . . . for judicial office. . . ."
>
> * * * * * * * *
>
> (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of his office."

The article of May 30, 1974, charged plaintiff with violating the provisions just quoted.

The import of the article was not merely that plaintiff offered a promise of "support" for a candidate for Attorney General. Due to the fact that the Attorney General was to be elected by the members of the Supreme Court, the promise of "support" by necessary inference included the promise of the *vote* of plaintiff as a sitting justice of the Supreme Court.

I cannot agree that the violation of the quoted provision of the Code of Judicial Conduct is permissible activity for a judicial candidate "in the context of the politics surrounding major party nominations." Such conduct is prohibited, wrong, and disgraceful. It is proper grounds for discipline of a lawyer and removal of a judge for misconduct. This court should not condone it as permissible.

Such conduct being as previously characterized, the imputation of such conduct is of necessity libelous.

I challenge this Court and the Supreme Court to declare in ringing and decisive tones that, regardless of the method of selecting judges, the prescribed standards of professional and judicial conduct are mandatory at all times and that there is no holiday from them during an election season.

Nevertheless, I am willing to accept the conclusion of the majority regarding the article of May 30, 1974, on the ground that the record fails to disclose any grounds of malice, knowledge of falsity, or reckless disregard of truth.

As to the May 31, 1974, article, I concur fully with the majority opinion.

.....

HENRY F. TODD, Judge

APPENDIX B

Court of Appeals of Tennessee
Middle Section at Nashville

Robert L. Taylor,
Plaintiff-Appellant,

vs.

Nashville Banner Publishing Company,
Defendant-Appellee.

Petition of Plaintiff-Appellant to Rehear

(Filed April 10, 1978, Ramsey Leathers, Clerk)

Comes Plaintiff-Appellant Robert L. Taylor and files this Petition to Rehear the Opinion of the Court and says:

1. Will T. Cheek in his deposition taken January 14, 1975, testified under oath that he did not give information published in the *Banner* article of May 30, 1974, that Taylor was actively seeking the nomination possibly by working a deal with the liberal element of the Executive Committee whereby Judicial Selection Commission member Russell Sugarman, a black, would be made Attorney General if a 'slate' was selected including Taylor. He said he was not of that opinion, that he didn't discuss that with anybody.

See Appellant's Assignment pages 23-24 citing pages 13-14 of Cheek's first deposition

2. The question of credibility arising from Cheek's recantation is: Since he was positive on his first deposition that he didn't give the information published in that *Banner* because he

was not of that opinion, how can the Court profess to believe (and, indeed, import absolute verity) to his second deposition in which he in part repudiates this first deposition? The precise point which remains unexplained is: if he was not of that opinion when he swore on January 14, 1975, how could the Court hold *as a matter of law* that his *refreshed recollection* was the absolute truth that could not be questioned?

.....

Attorney for Appellant

APPENDIX C

Robert L. Taylor,
Plaintiff-Appellant,

vs.

Nashville Banner Publishing Company,
Defendant-Appellee.

} Davidson Law.

Opinion on Petition to Rehear

(Filed May 16, 1978, Ramsey Leathers,
Clerk, Court of Appeals)

Plaintiff Taylor has filed a brief petition to rehear in which he asks how this Court can ignore the first deposition of Will Cheek and "import absolute verity" to the second. We think it clear from the principal opinion, however, that we did not view Cheek's depositions in this way. Rather, we assumed that his inconsistent statements had the effect of "cancelling each other out," which left us with the testimony of Morrell and Long that Cheek was their source for the disputed statement in the article of May 30, 1974. Our approach to this issue has been fully explained in the principal opinion and will not be further recapitulated here.

The petition to rehear is respectfully denied.

.....

Frank F. Drowota, III, Judge

Todd, J., concurs.
Blackburn, Sp. J., concurs.

APPENDIX D

In the Supreme Court of Tennessee at Nashville

Robert L. Taylor,
Petitioner,
v.
Nashville Banner Publishing Company,
Respondent.
} Davidson Law

Order

(Filed November 6, 1978, Ramsey Leathers, Clerk, Supreme Court)

On considering the petition for certiorari and briefs filed in this case and the entire record, the petition of Robert L. Taylor is denied at cost of the petitioner.

PER CURIAM

Not Participating:
Fones, J.

APPENDIX E

In the Circuit Court for Davidson County, Tennessee for Nashville

Robert L. Taylor,
Plaintiff,
v.
Nashville Banner Publishing Company,
Defendant.
} No. B-16795

Plaintiff's Petition to Rehear (With Appendices I & II)

(Filed February 7, 1977)

Comes the plaintiff, Robert L. Taylor, and petitions the Court to rehear the judgment sustaining the defendant's motion for a summary judgment and dismissing this action and for grounds thereof says:

I

The record, consisting of affidavits, exhibits and depositions, clearly shows that there is a genuine issue of actual malice and recklessness by the defendant in the publication of the Article on May 30, 1974, precluding the disposal by summary judgment, all as fully shown by plaintiff's brief in opposition to the motion for summary judgment mentioned in the Court's memorandum opinion, a copy of which brief is annexed hereto and made a part of this petition to rehear. It has been established that the court on motion for summary judgment cannot weigh evidence, determine the credibility of witnesses or try the case

on affidavits. As a corollary to this rule, on motion for summary judgment it is not the function of the court to make findings of fact. Findings of fact and conclusions of law have no place in summary judgment procedure.

II

The dismissal of this action on the record amounts to denial and violation of plaintiff's Seventh Amendment right to a trial of the case by a jury by state action according to the declaration of the law by the United States Supreme Court in *New York Times Co. v. Sullivan,* 376 U.S. 254 in these words:

> "Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is a common law only, though supplemented by statute. See, e.g., Alabama Code, Tit. 7, Sections 908-917. The test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised. (citing cases)"

Plaintiff says that he is a citizen of the United States and is entitled to invoke—and does invoke in this case—the guarantees of due process of law and the equal protection of the laws under the Fourteenth Amendment, as well as the right of trial by a jury under the Seventh Amendment; and that his rights should be respected and given equal protection with the rights of the press to the constitutional guaranties under the First Amendment. The courts cannot assure due process of law by favoring the First Amendment rights claimed by the plaintiff. Plaintiff claims that the superior right is the right to the equal protection of the law.

III

The court, in its memorandum opinion, did not pass on (except by implication) his claim (set forth in pages 40 to 50 of the annexed brief in opposition to the defendant's motion for summary judgment) that the defendant's May 31st article was an unconstitutional infringement on his constitutional rights to the benefit of a system of laws designed to safeguard individuals in the enjoyment of the presumption of innocence. Plaintiff says that it is the duty of this Court to uphold and defend his Federally protected right against the publication of false accusations in such circumstances as appear in the case at bar and that the public interest does not require that the right to enjoy a good name shall be made subservient to the right of free speech. Plaintiff says that his claim has been overlooked by the Court.

IV

On November 16th, 1976, in open court pursuant to notice, plaintiff moved for leave to amend his complaint. A copy of the proposed amendment is annexed hereto and made a part hereof. The Court made no ruling on this motion until the filing of the memorandum opinion containing the following statement:

> "The plaintiff has attempted by amendment to his complaint to disguise this libel action by seeking redress for another tort, that of intentional interference with plaintiff's prospective advantage, but libel actions by another name are still libel actions and are considered in light of the First Amendment."

Plaintiff protests the statement that he attempted to "disguise" the libel action. The amendment in question was not sought by plaintiff until by the process of discovery he had obtained convincing evidence to prove the allegations made in the proposed amendment. Plaintiff says that the amendment is

proper and his motion should be granted. In order to preserve the question for review he asks that the Court rule specifically on the motion, identifying the proposed amendment presented to the Court.

WHEREFORE, plaintiff asks that the judgment dismissing this action be vacated and set aside and the case stand for trial of the issues of fact before a jury in accordance with the guarantees of both the State and Federal constitutions.

.....

Attorney for Plaintiff

APPENDIX F

In the Circuit Court for Davidson County, Tennessee

Robert L. Taylor
vs.
Nashville Banner Publishing Company } No. B-16795

Memorandum on Behalf of Plaintiff in Support of Petition to Rehear

(Filed February 7, 1977)

In the Court's memorandum it is stated that the plaintiff has submitted scant authority appropriate to the *Times* standard in support of his position. Plaintiff now brings to the attention of the Court the U. S. Supreme Court's decision in the case of *Time, Inc. v. Hill*, 385 U. S. 374, 87 S Ct 534. Attention is especially called to Section II of the opinion (pages 544-545) in which the Court examined the facts of the case and held that the proofs would reasonably support either a jury finding of innocent or merely negligent misstatement by Life, or a finding that Life portrayed the play as a reenactment of the Hill family's experience reckless of the truth or with actual knowledge that the portrayal was false. This authority applies the *New York Times standard* saying, "We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct. Similarly, calculated falsehood should enjoy no immunity in the situation here presented us."

In the case of *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S Ct 993, the Court declared that on summary judgment,

inferences to be drawn from underlying facts contained in materials presented must be viewed in the light most favorable to the party opposing the motion. The cases was reversed because the Supreme Court concluded from a study of the record that inferences contrary to those drawn by the trial court might be permissible.

For the convenience of the Court Xerox copies of tthe opinions on both of the above mentioned cases are attached hereto.

APPENDIX G

In the Second Circuit Court for Davidson County, Tennessee

Robert L. Taylor
vs.
Nashville Banner Publishing Company
} Civil Docket No. B-16795

ORDER

(Filed March 5, 1977)

Heretofore the plaintiff has filed a Motion to Reconsider its previous ORDER.

The two cases cited by the plaintiff were considered in the Court's original opinion, therefore the plaintiff's motion is respectfully overruled.

SO ORDERED.

Entered this 15th day of March, 1977.

.....
HAL HARDIN, Judge

Copies mailed to:

Mr. James F. Neal, Atty.
Mr. Fyke Farmer, Atty.

APPENDIX H

Plaintiff prayed an appeal which was granted (p. 217); and the appeal was duly perfected by the plaintiff filing an appeal bond. (p. 218)

Assignments of Error

(Filed August 9, 1977)

I

The lower court erred in holding that the statements in the articles published in the *Banner* on May 30th and 31st, 1974, were not defamatory of the plaintiff-appellant.

II

The lower court erred in holding that the defendant established as a matter of law that there was no genuine issue of fact for trial in this case and in holding that the record reflects absolutely no evidence that the statements concerning the plaintiff made by the defendant were calculated falsehoods or made with reckless disregard for their truth or falsity.

III

The lower court erred in refusing to allow the plaintiff-appellant to amend his complaint.

IV

The lower court erred in weighing the evidence and determining the credibility of witnesses since it is not the function of the court on motion for summary judgment to make findings of fact. Findings of fact and conclusions of law have no place in summary judgment procedure in this case and cannot be a substitute for a trial of the disputed factual issues. *Evco Corporation v. Ross,* 528 S. W. 2d 20; see also numerous authorities in other jurisdictions cited in *49 CJS Supp. Judgments Sec. 226, page 429* under sub-heading *Weight and credibility of evidence not considered* and sub-heading *Factual issues not tried or resolved.*

The plaintiff-appellant says that the dismissal of this action by the court below amounts to a denial and violation by state action of his Seventh Amendment right to a trial of the case by a jury. He is a citizen of the United States and is entitled to invoke—and does invoke—the guarantees of due process of law and equal protection of the laws under the Fourteenth Amendment, as well as the right of trial by a jury under the Seventh Amendment. He says that his rights should be respected and treated as superior to the rights of the press under the First Amendment so as recently enlarged by the United States Supreme Court. Our democracy cannot survive the inevitable and insidious on-slaught on the right of individual freedom—whether of public figures or the ordinary private citizen—to his good name and the traditional presumption of innocence, if freedom of expression must have so expanded a "breathing space" as is claimed by *The Nashville Banner* in the case at bar—the freedom to publish lies about any public figure who does not drop down on his knees craven before its unrestrained power. The power will be abused to crush out individual freedom.

V

The lower court erred in sustaining defendant's motion for a summary judgment and dismissing this action.

APPENDIX I

Assignments of Error

(Filed August 14, 1977)

I

The Court of Appeals erred in weighing the evidence and judging the credibility of witnesses and holding that there was no genuine issue of fact as regards the issue of actual malice on the part of the defendant in publishing the articles of May 30 and 31, 1974, within the United States Supreme Court decisions on the subject.

II

The Court of Appeals erred in failing and refusing to decide that the article of May 30, 1974, was defamatory of the petitioner.

III

The Court of Appeals erred in holding that the article of May 31, 1974, was not defamatory of petitioner.

IV

The Court of Appeals misconceived petitioner's contention that the defendant in publishing the article of May 31, 1974, could not lay claim to any constitutional right of free speech under the First Amendment which was entitled to preference over his constitutional rights to due process of law and equal protection of the laws and especially the safeguards erected by our system of jurisprudence and fundamental law to protect the individual through the maintenance of secrecy of official

prosecutorial investigative procedures in the case of criminal charges and in disposing of his contention with the statement:

> "Our conclusion renders it unnecessary to consider plaintiff's rather lengthy arguments on other matters, such as the applicability of non-constitutional privilege to publish comments on official proceeding."

V

In view of the decision of the Court of Appeals that the trial court granted petitioner's motion for leave to file a second amendment to his complaint and that this amendment was for practical purpose an averment of the same cause of action asserted in his first amendment, i.e., a common law action on the case for damage by written or oral falsehoods that are not defamatory, if they are maliciously published and as calculated to produce, and do produce damage, a different action than one for libel or slander, it should have remanded the case for trial of this cause of action, irrespective of whether the two articles or either of them were non-defamatory.

VI

The Court of Appeals erred in denying petitioner's claim to a Federally protected right expressed in his Assignment IV in the Court of Appeals in these words:

> The plaintiff-appellant says that the dismissal of this action by the court below amounts to a denial and violation by state action of his Seventh Amendment right to a trial of the case by a jury. He is a citizen of the United States and is entitled to invoke—and does invoke—the guarantees of due process of law and equal protection of the laws under the Fourteenth Amendment, as well as the right of trial by a jury under the Seventh Amendment. He

says that his rights should be respected and treated as superior to the rights of the press under the First Amendment so as recently enlarged by the United States Supreme Court. Our democracy cannot survive the inevitable and insidious onslaught on the right of individual freedom—whether of public figures or the ordinary private citizen—to his good name and the traditional presumption of innocense, if freedom of expression must have so expanded a "breathing space" as is claimed by *The Nashville Banner* in the case at bar—the freedom to publish lies about any public figure who does not drop down on his knees craven before its unrestrained power. The power will be abused to crush out individual freedom.

VIII

The Court of Appeals erred in holding that the trial court followed proper summary judgment procedure on all issues and properly granted defendant's motion for summary judgment and dismissing the case. Where the defendant published the two articles of May 30 and 31, 1974 with actual malice was a genuine issue for trial before a jury which petitioner had demanded in his complaint.

APPENDIX J

Nashville Banner.

EX #2
CBL 1-14-75

Long May Our Land Be Bright With Freedom's Holy Light; Protect Us By Thy Might, Great God Our King.

VOL. XCVIII No. 45 — Copyright © 1974, Nashville Banner Publishing Company — NASHVILLE, TENN., FRIDAY AFTERNOON, MAY 31, 1974 — 58 PAGES — PRICE: 15 CENTS

Democratic Committeewoman Tells Of Attempt To Influence High Court Vote

Shriver Probing Bribe Try

By LARRY BRINTON

A member of the State Democratic Executive Committee today said an attempt was made this week to "buy my vote" for Memphis Attorney Robert Taylor in Saturday's committee election for State Supreme Court nominees.

The charge was leveled by Mrs. Helen A. Brown, of 1821 Hatch Ave., and a doubled probe has been launched into the allegation by the staff of Dist. Atty. Gen. Thomas Shriver.

The State Democratic Executive Committee member said the alleged bribe attempt was made Tuesday at her home by a man and woman, whose names she could not recall, but could identify.

"How much financing would it take to get your vote," Mrs. Brown said the man asked after she told him she had not made up her mind as to whom she would vote for Saturday and he allegedly had suggested she vote for Taylor as one of five Democratic nominees.

"My vote is not for sale," the woman said she replied. Mrs. Brown said the answer "irritated" the woman, about 55 years old, who had originally telephoned her on May 23.

Election To Continue

James Sasser, chairman of the State Democratic Executive Committee, said the election will continue Saturday as planned.

"We plan to continue with our meeting as planned and to nominate our Supreme Court justices," Sasser explained. "I think this sort of attempt to influence voters is reprehensible, and shocking and I think Mrs. Brown is to be congratulated for coming forward."

The committee chairman said the nominees must be certified before the June 6 Democratic Primary election and the election must be held Saturday as planned.

Meantime, Shriver said his investigators began the probe this morning.

"We can't anticipate how long the investigation is going to take, but I doubt seriously it will be completed by Saturday," he commented.

The district attorney said he believed his investigators had learned the identity of the woman and expect to learn from her the man's identity.

Taylor could not be reached for comment. His Memphis law firm reported he was in Nashville for the weekend.

First Contact May 23

Mrs. Brown, serving her first term on the executive committee, said the woman had first contacted her by telephone May 23 stating she wanted to discuss the Davidson County Democratic Executive Committee with her.

"She said she wanted to talk to me about the election of a chairman for the county election committee and she said she also wanted to feel me out on some of the candidates that are coming up for the court nomination," Mrs. Brown told

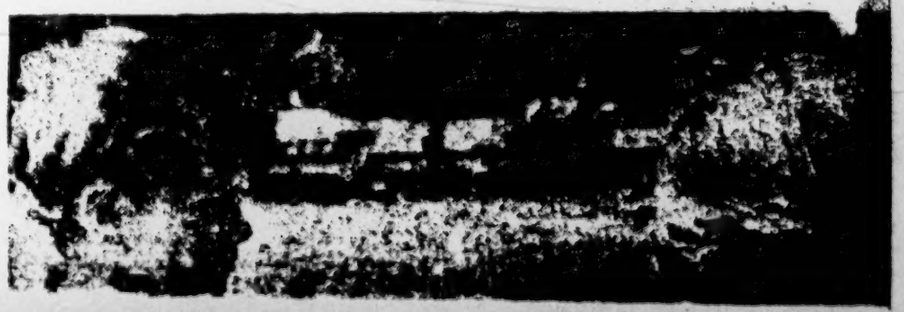
[illegible] Banner.

After discussing politics [illegible] a few minutes on the te[illegible] phone, Mrs. Brown said it w[illegible] agreed that the woman, w[illegible] identified herself to the co[illegible] mitteewoman, would visit M[illegible] Brown said, referring to [illegible] continue the conversation.

"She came Tuesday, but s[illegible] didn't say she was going [illegible] have anyone with her."

(Please turn to Page [illegible])

Nixon, Dairy Funds Linked; [illegible] Promised: Jaworski



Shriver Probes Demo Committeewoman's Report Of Bribe Try

FROM PAGE 1

Brown said, refering to the man, who told her he worked at the Metro Courthouse.

"She introduced herself, but I'm not very good on names," she commented. "He introduced himself, also."

"We talked about the county executive committee and she said she didn't like the way things were being run, that people were telling you how to vote and who to vote for," Mrs. Brown recalled.

"I said that politics is kind of dirty and gets nasty sometimes," she added. It was then, Mrs. Brown said, that the unidentified man began naming some of the nominees for the justice posts on the State Supreme Court.

"They asked me who I was in favor of," she said. "I said nobody in particular right now and that my mind was not really made up since I had until Saturday morning to reach a conclusion.

"This man spoke up and said 'how do you feel about Taylor? I feel like he's the man for the job.' "

Taylor Discussed

Mrs. Brown said she told the couple that she didn't favor Taylor over any of the other candidates.

"He said Taylor had done so much for the blacks in the Civil Rights movement." The committee member said they then discussed Taylor's role as chairman of Alabama Gov. George's Wallace's Tennessee presidential campaign bid.

"That's when he asked me 'How much financing would it take to get your vote?'," Mrs. Msr. stated. After stating she wouldn't sell her vote, she said the man said," I don't want to pressure you, but I wish you would think about it."

After turning down the alleged bribe attempt, Mrs. Brown said, the man "sort of smiled and tried to approach me at a different angle, but the woman called me 'hard-headed' and 'stubborn'."

Mrs. Brown said the man telephoned her Thursday, again identified himself, and inquired if she had changed her mind. The woman said she answered that she still had not decided how she would vote Saturday.

Mrs. Brown later contacted her attorney, Gilbert Merritt, who took a statement from her and turned it over to Shriver.

Taylor was one of a flock of Democrats who sought recommendation to the State Supreme Court by a special commission named by the Democratic Executive Committee.

The commission recommended eight persons, from which the executive committee can nominate five. Taylor was not one of the eight, but he still hopes to be one of the five nominees.

In its meeting Saturday, the executive committee is under no obligation to choose from the eight people recommended by the special commission.

Committee members privately have confided that the political infighting and dealing for the five posts have been fierce.

Cable Firm To Request Franchise

By ALLEN GREEN

Nashville Cable Communications, Inc. tentatively plans to file franchise application with the Metro clerk's office within "30-60 days," spokesmen said today.

The organization, affiliated with Cox Cable Communications, Inc., Atlanta, presented a letter to the special CATV committee Thursday night, saying it "is now ready and desirous of making application for a franchise to construct and operate a CATV system in Nashville and Davidson County."

The letter asked the committee to send the local company "the information . . . which a CATV special committee deems necessary to be included in the application."

Committee Chairman John H. DeWitt Jr., has indicated the committee will take its time in considering what recommendation to make to the Metro Council.

Less than one half of the 25-member committee was present for the third regularly scheduled meeting. A special meeting is scheduled June 6 to finish approving committee by-laws.

78-1339

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. A-702

ROBERT L. TAYLOR,
Petitioner,

v.

NASHVILLE BANNER PUBLISHING COMPANY,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari

JAMES F. NEAL
JON D. ROSS
NEAL & HARWELL
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St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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IN THE

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NASHVILLE BANNER PUBLISHING COMPANY,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari

The respondent, Nashville Banner Publishing Company, files this brief in opposition to the petition for a writ of certiorari to review the judgment of the Supreme Court of Tennessee entered on November 6, 1978.

OPINIONS BELOW

The opinion of the Tennessee Court of Appeals (App. A, infra, pp. A-1-A-27) is reported at 573 S.W.2d 474. The text of the order of the Tennessee Supreme Court (App. B, infra,

p. A-28) entered on November 6, 1978, denying petitioner's Petition for Certiorari to review the decision of the Tennessee Court of Appeals was not reported.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3). Respondent contends that this Court lacks jurisdiction over the subject matter, since petitioner has sought a writ of certiorari to review the judgment of the Tennessee Supreme Court denying petitioner's Petition for a Writ of Certiorari to review the decision of the Tennessee Court of Appeals. This Court only has jurisdiction to review decisions by the highest court of the state in which a decision could be had, and that decision was the decision of the Tennessee Court of Appeals.

QUESTIONS PRESENTED

Whether this Court has jurisdiction under 28 U.S.C. § 1257 (3) to review the judgment of the Supreme Court of Tennessee denying petitioner's Petition for Certiorari to review the judgment of the Tennessee Court of Appeals, where the Tennessee Court of Appeals is the highest court of the state in which a decision could be had.

Whether the Tennessee Court of Appeals erred in affirming the trial court's award of summary judgment to the respondent on the grounds that there was no genuine issue as to any material fact and that respondent was entitled to judgment as a matter of law on the issue of actual malice.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in part:

> Congress shall make no law . . . abridging the Freedom of Speech, or of the Press . . .

The Fourteenth Amendment of the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

28 U.S.C. § 1257(3) provides:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Tenn. Code Ann. § 27-819 provides:

> Review of Court of Appeals by Supreme Court.—The Supreme Court, or any judge thereof, shall have the right to require, by certiorari, the removal to that Court for

review of any case that has been finally determined in the Court of Appeals, upon a petition for this purpose filed in the Supreme Court, which petition shall state the substance of the case to be decided, and shall be accompanied by assignments of error and brief in conformity with such rules as the Supreme Court may prescribe; and there shall be no other method of review.

STATEMENT OF THE CASE

This is a libel action filed on May 27, 1975, almost a full year after the articles which are the subject of this action were published by The Nashville Banner on May 30 and May 31, 1974. The two articles concerned political maneuvering by petitioner to obtain a seat on the Tennessee Supreme Court and an alleged approach by other individuals on behalf of petitioner to a member of the Tennessee Democratic Executive Committee to ask her "how much financing it would take to get her vote." The subject matter of the articles is of vital public or general concern and is clearly entitled to constitutional protection. At the time of publication, petitioner was a well known public figure in Tennessee and was a candidate actively seeking nomination to the Tennessee Supreme Court.

Petitioner charged in his complaint that both of the articles charged him with the crime of bribery. Respondent moved for summary judgment on two grounds; first, as a matter of law the articles were not defamatory of petitioner and second, as a matter of law there was no genuine issue as to any material fact on the issue of "actual malice."

The motion for summary judgment was pending in the trial court for over a year, and the trial court allowed every indulgence to the petitioner including amendments to the complaint and additional time to conduct further discovery and submit

final briefs. (R. 153) The record was fully developed and both sides had ample opportunity to submit affidavits, depositions and legal memoranda in support of their respective positions.

On January 5, 1977, the trial court filed an extensive memorandum opinion sustaining respondent's motion for summary judgment. (R. 129-153) The trial court held as a matter of law that the language in the articles was clear and unambiguous, that it certainly did not charge petitioner with the crime of bribery, and that the articles were not defamatory of petitioner. The trial court further held that the record reflected *absolutely no evidence* that the statements made by the respondent were calculated falsehoods or were made with reckless disregard for their truth or falsity.

The Tennessee Court of Appeals affirmed the trial court's granting of respondent's motion for summary judgment as to both articles published on May 30 and May 31, 1974, respectively. As to the May 30 article, the Tennessee Court of Appeals held that respondent's publication was protected by a constitutional privilege due to the absence of competent evidence that the article was published with "actual malice." Since the Tennessee Court of Appeals found that the May 30 article was published by respondent without actual malice, it did not reach a conclusion on the issue of whether that article was defamatory of petitioner. As to the May 31 article, the Tennessee Court of Appeals affirmed the decision of the trial court and held that respondent's publication of that article was constitutionally protected as a matter of law because of the absence of any issue of material fact with respect to actual malice. The Tennessee Court of Appeals further held as to the May 31 article that it could not be construed as a defamation of petitioner. The Tennessee Supreme Court declined to exercise its discretionary jurisdiction under T.C.A. §27-819 to review the decision of the Tennessee Court of Appeals and denied petitioner's petition for certiorari to review the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

The order of the Tennessee Supreme Court denying certiorari to review the decision of the Tennessee Court of Appeals is not the judgment which is reviewable under 28 U.S.C. §1257(3). When the Tennessee Supreme Court declined to exercise its authority to review the decision of the Tennessee Court of Appeals, the judgment of the Tennessee Court of Appeals rather than the order of refusal by the Tennessee Supreme Court is the judgment properly reviewable under 28 U.S.C. §1257(3). *See American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923).

The Tennessee Court of Appeals correctly affirmed the trial court's granting of summary judgment to the respondent, since the publication of both articles was protected by constitutional privilege and there was no genuine issue of material fact on the issue of actual malice. Petitioner was clearly a "public figure" under the applicable decisions of this Court. As a candidate for a seat on the Tennessee Supreme Court, the rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964) was applicable. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). The trial court in the instant case found no material discrepancies in the voluminous depositions and affidavits filed in this cause. (R. 144) None of petitioner's proofs considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question as to whether the alleged defamatory falsehoods were published with knowledge that they were false or with reckless disregard of whether they were false or not. Since First Amendment considerations are involved in defamation actions such as the case at bar, summary judgment procedures are particularly appropriate. *See Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 865 (5th Cir. 1970) and *Treutler v. Meredith Corp.*, 455 F.2d 855 (8th Cir. 1972).

In order to demonstrate actual malice and to show reckless disregard for truth or falsity, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In the instant case, petitioner introduced no such evidence.

The Tennessee Court of Appeals correctly held as a matter of law that the article of May 31, 1974, was not defamatory of petitioner. Petitioner charged that both of the articles charged him with the crime of bribery. The statements claimed to be defamatory by petitioner when read in the sense that the readers to whom the article was addressed would understand it, simply does not amount to a charge of bribery. (R. 152) Where the language complained of is clearly unambiguous, its meaning and character presents a question of law for the Court. *See Brown v. Newman*, 224 Tenn. 197, 457 S.W.2d 120, 122 (1970). Respondent submits that the trial court correctly decided as a matter of law that the clear and unambiguous language contained in both articles was not capable of being interpreted as defamatory toward petitioner.

The Tennessee Court of Appeals did not weigh the evidence or judge the credibility of witnesses in holding that there was no genuine issue of material fact on the issue of actual malice. In viewing the inconsistent depositions of Will Cheek, the Tennessee Court of Appeals noted the rule in Tennessee that contradictory statements of a witness in connection with the same fact had the result of canceling each other out. Unexplained, conflicting statements of a witness nullify each other, and are entitled to no weight as evidence unless corroborated. *Nashville & American Trust Co. v. Aetna Casualty & Surety Co.*, 21 Tenn. App. 366, 110 S.W.2d 1041, 1046 (1937).

The Tennessee Court of Appeals noted that the inconsistency in Will Cheek's testimony was explained by his refreshed recol-

lection and further noted that Cheek's testimony in his second deposition was corroborated, while the testimony of his first deposition was uncorroborated. Disregarding the inconsistent testimony of Mr. Cheek was to view the evidence in a light as favorable to petitioner as that required by the summary judgment standard and perhaps more so.

The Tennessee Court of Appeals correctly affirmed the trial court's granting of summary judgment for respondent on the cause of action for intentional interference with prospective advantage which petitioner sought to plead by way of amendments to his original complaint. Petitioner sought by way of amendments to plead a tort which appears to be intentional interference with prospective advantage, or, more specifically, the tort of injurious falsehood which is merely a species of intentional interference with prospective advantage. The Tennessee Court of Appeals correctly observed that petitioner presented no evidence to raise an issue of material fact on any of the elements of that tort in the instant case. Further, the Tennessee Court of Appeals noted that petitioner had cited no authority in support of that cause of action or even to show that such a tort is recognized in Tennessee.

The Tennessee Court of Appeals agreed with the trial court that the First Amendment not only protects respondent against a charge of libel in this case, but it also protects respondent against liability for this tort. In general, it may be said that injurious falsehood, which is a tort that never has been greatly favored by the law, is subject to all of the privileges recognized both in cases of personal defamation and in those other types of interference with economic advantage. W. Prosser, *The Law of Torts*, 4th Ed. § 128 (1971). No matter what legal garb petitioner sought to dress his complaint in, it was incumbent upon petitioner to prove actual malice with convincing clarity and he completely failed to do this.

ARGUMENT

I. This Court Lacks Jurisdiction Over the Subject Matter, Since Petitioner Has Sought Review in This Court of the Wrong State Court Determination, Thus Depriving This Court of Jurisdiction.

Petitioner has invoked the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. § 1257(3), and has sought a writ of certiorari to review the judgment of the Supreme Court of Tennessee entered on November 6, 1978, wherein that Court denied petitioner's petition for certiorari to review the decision of the Tennessee Court of Appeals. Under the provisions of 28 U.S.C. § 1257(3), this Court may review only the determinations "by the highest court of a state in which a decision could be had." Under Tennessee law, the Tennessee Supreme Court is granted discretion pursuant to the provisions of T.C.A. § 27-819 to exercise jurisdiction to review the merits of decisions of the Tennessee Court of Appeals.

When the Tennessee Supreme Court entered its Order on November 6, 1978, and declined to exercise its jurisdiction to hear the merits of the case, the Tennessee Court of Appeals was shown to be the highest court of the state in which a decision could be had. *See American Railway Express Co. v. Levee*, 263 U.S. 19, 20, 21 (1923), *see also Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 160 (1954).

In *American Railway Express Co. v. Levee, supra*, the defendant applied to the Supreme Court of Louisiana for a writ of certiorari, but the writ was "refused for the reason that the judgment is correct." The respondent urged that the writ of certiorari was incorrectly addressed to the Court of Appeal of the State of Louisiana rather than to the Louisiana Supreme Court. This Court held that the writ of certiorari would prop-

erly issue to review the decision of the Court of Appeal. In the *Calvert* case the appellants were uncertain whether the appeal to this Court was properly from the Court of Civil Appeals or from the Supreme Court of Texas. Hence, each appellant appealed from each of the Courts. This Court held that the appeals were properly from the Court of Civil Appeals relying upon the earlier case of *American Railway Express Co. v. Levee, supra.*

Accordingly, petitioner has deprived this Court of jurisdiction under the provisions of 28 U.S.C. § 1257 by failing to seek a determination of the proper court decision, the decision of the Tennessee Court of Appeals, that Court's decision being the decision by the highest court of the state in which a decision could be had.

II. The Tennessee Court of Appeals Correctly Affirmed the Trial Court's Granting of Summary Judgment to the Respondent and the Tennessee Court of Appeals Correctly Held That the Publication of Both Articles Was Protected by Constitutional Privilege as There Was No Genuine Issue of Material Fact on the Issue of Actual Malice.

This libel action was filed on May 27, 1975, almost a full year after the articles which are the subject of this action were published by The Nashville Banner on May 30 and May 31, 1974. The text of these two articles are set forth as an appendix to the opinion of the Tennessee Court of Appeals. (App. A, infra, A-18-A-25) The subject matter of the two articles generally concerned the election of candidates to the Tennessee Supreme Court and specifically the political campaign and political maneuvering of the petitioner as one of the candidates vying for election to that body.

Fundamentally, both of these articles concerned subject matter which is of vital public or general interest. *See Rosenbloom*

v. Metro Media, 403 U.S. 29, 44 (1971). The public plainly has a vital interest not only in the calibre of candidates for political office, but in the nature of the groups or factions supporting the candidates, and the quality of candidates' spokesmen and backers are appropriate considerations to be taken into account. *See Thompson v. Evening Star Newspaper Co.,* 394 F.2d 774, 776 (D.C. Cir.), *cert. denied,* 393 U.S. 884 (1968). Thus, the very subject matter of these news reports is one of particular First Amendment concern. *See Greenbelt Coop. Pub. Asso. v. Bresler,* 398 U.S. 6, 11 (1970). To permit infliction of financial liability upon respondent for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments. *See Greenbelt Coop. Pub. Asso. v. Bresler, supra* at 14.

While respondent believed that it was entitled to summary judgment on a number of grounds, including truth of the matters published, (R.74) respondent moved for summary judgment on two grounds, both of which were sustained by the trial court. Respondent's first ground for summary judgment was that the language in the articles was clear and unambiguous and that the trial court should find as a matter of law that the articles were not defamatory of petitioner. (R.26) The second ground of respondent's motion for summary judgment was that there was no genuine issue as to any material fact on the issue of "actual malice" and that the respondent was entitled to judgment as a matter of law.

The Tennessee Court of Appeals held that the publication of both articles was protected by constitutional privilege and that there was no genuine issue of material fact on the question of actual malice. The Tennessee Court of Appeals further held in regard to the May 31 article that it certainly could not be construed as a defamation of petitioner. The Tennessee Court of Appeals did not reach a conclusion on the issue of whether

the article of May 30 was defamatory of petitioner, since that court affirmed the decision of the trial court on the issue of actual malice.

In affirming the decision of the trial court awarding summary judgment to respondent, the Tennessee Court of Appeals did not have to weigh the evidence and determine the credibility of witnesses in reaching its decision, since the record was totally devoid of any competent evidence introduced by petitioner on the issue of "actual malice." The only real question before this Court is whether the Tennessee Court of Appeals in the instant case properly affirmed the decision of the trial court granting summary judgment to the respondent. Respondent respectfully submits that based upon the record that this was a proper case for awarding summary judgment, that the Tennessee Court of Appeals correctly decided this issue in accordance with the decisions of this Court, and that this case does not merit the granting of petitioner's petition for certiorari.

In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. *See Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). Summary judgment is an integral part of the constitutional protection afforded defendants in actions such as this. *Cerrito v. Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Calif. 1969).

Numerous courts have found summary judgment for publishers proper, as in the instant case, where the record is devoid of genuine issues of fact as to whether the alleged defamatory statement was published with actual knowledge of its falsity or with a reckless disregard of whether it was true or false. *See Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 865 (5th Cir. 1970). *See also Time, Inc. v. McLaney*, 406

F.2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Hurley v. Northwest Publications, Inc.*, 398 F.2d 346 (8th Cir. 1968); *Walker v. Pulitzer Pub. Co.*, 394 F.2d 800 (8th Cir. 1968); and *Thompson v. Evening Star Newspaper Co., supra.*

III. The Tennessee Court of Appeals Correctly Held That the Publication of Both Articles Was Protected by Constitutional Privilege and That There Was No Genuine Issue of Material Fact on the Issue of Actual Malice, Since Petitioner Completely and Utterly Failed to Set Forth Any Specific Facts to Show That This Would Be a Genuine Issue for Trial or to Satisfy the Constitutional Standard of Clear and Convincing Proof Required on This Issue.

As a candidate for one of the seats on the Tennessee Supreme Court, petitioner was clearly a "public figure" under the applicable decisions of this Court, and the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) was applicable. Under the rule in *Times*, for petitioner to recover for alleged defamatory falsehoods herein, it was incumbent upon the petitioner to prove "actual malice" with convincing clarity. Petitioner must prove that the statements were made by respondent with actual knowledge that the statements were false or with reckless disregard for whether the statements were false or not.

The instant case is controlled by *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). In *Roy*, three days before the Democratic Primary in New Hampshire, The Concord Monitor published a column discussing the forthcoming election. The column spoke of political maneuvering in the primary campaign, referred to the criminal records of several of the candidates, and characterized the plaintiff, who was one of the candidates

for the United States Senate, as "a former small-time bootlegger."

The trial court in *Roy* instructed the jury that the plaintiff, as a candidate for elective office, was a "public official." This Court in *Roy* remarked:

> Given the later cases, it might be preferable to categorize a candidate as a "public figure," if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as the standard of liability in this case is concerned, for it is abundantly clear that, whichever term is applied, publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. That *New York Times* itself was intended to apply to candidates, in spite of the use of the more restricted "public official" terminology, is readily apparent from that opinion's text and citations to case law.

Monitor Patriot Co. v. Roy, supra at 271.

The rule in *New York Times* indicates that plaintiffs have a special burden of proof concerning libel about public officials which "relate to official conduct." In the *Roy* case, this Court defined "official conduct" as it pertains to candidates for public office and held that a newspaper publisher will be protected by the *New York Times* rule when it publishes articles concerning "anything which might touch on an official's fitness for office." The Court then remarked that "official conduct" clearly has little applicability in the context of an election campaign. In *Roy* the Court held as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or candidate's fitness for office for purposes of the "knowing falsehood or reckless disregard" rule of *New York Times v. Sullivan*. *See Monitor Patriot Co. v. Roy, supra* at 277.

The subject matter of the two articles, concerning political maneuvering by petitioner to obtain a seat on the Tennessee Supreme Court and an alleged approach to a member of the Democratic Executive Committee to ask her "how much financing it would take to get her vote" is clearly a matter of vital public or general concern which is entitled to constitutional protection. *See Rosenbloom v. Metro Media, supra* at 44. In addition, the two articles concerned discussions involving matters of important public concern and are therefore entitled to constitutional protection. *See Time, Inc. v. McLaney, supra* at 573.

Since petitioner is clearly a "public figure" under applicable law, and since these articles concern matters of vital public or general concern, petitioner may recover for alleged injury to his reputation only on clear and convincing proof that the alleged defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. *See Gertz v. Welch*, 418 U.S. 323, 342 (1974). Mere negligence in publishing the alleged defamation without verification is insufficient to establish "actual malice." *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Actual ill will or intent to inflict harm is insufficient to prove "actual malice." *See Henry v. Collins*, 380 U.S. 356, 357 (1965). To establish actual malice the publisher must act with a "high degree of awareness of probable falsity." *See Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), and *see also St. Amant v. Thompson, supra* at 731. The showing of malice may not be presumed, but is a matter for proof by the plaintiff. *See New York Times Co. v. Sullivan, supra* at 284, and *see also Time, Inc. v. McLaney, supra* at 572. In order to demonstrate actual malice and to show reckless disregard for truth or falsity, there must be sufficient evidence to permit the conclusion that the defendant in fact

entertained serious doubts as to the truth of his publication. *See St. Amant v. Thompson, supra* at 731.

Actual malice is a constitutional issue to be decided initially bv the trial judge vis-a-vis motions for summary judgment and directed verdict. *Bon Air Hotel, Inc. v. Time, Inc., supra* at 864. *See also Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970) (Wright, J., concurring).

In the case at bar, every indulgence was allowed to the petitioner, including allowing amendments to the Complaint, and additional time to conduct further discovery and to submit final briefs. (R. 153) The record was fully developed and both sides had ample opportunity to submit affidavits, depositions, and legal memoranda in support of their respective positions. Unless the Court finds, on the basis of pre-trial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendants. *Wasserman v. Time, Inc., supra* at 922 (Wright, J., concurring). Since important First Amendment considerations are involved in defamation actions such as the case at bar, summary judgment procedures are particularly appropriate. *See Bon Air Hotel, Inc. v. Time, Inc., supra*, and *Treutler v. Meredith Corp.*, 455 F.2d 255 (8th Cir. 1972).

Since the very pendency of a libel action may cut across the public interest in free and untrammeled speech on public issues, the public figure cannot resist a newspaper's motion for summary judgment under Rule 56 by arguing that there is an issue for the jury as to malice unless he makes some showing, of the kind contemplated by the Rules, of facts from which malice may be inferred. *Thompson v. Evening Star Newspaper Co., supra* at 776. Immaterial discrepancies appearing in affidavits and depositions will not defeat the movant's right to

summary judgment. The mere hope of plaintiff that somehow or other on cross-examination the credibility of a defense witness can be put in issue is not sufficient to resist a motion for summary judgment. *See Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967, 974 (D. Minn. 1967). The trial court in the instant case found no material discrepancies in the voluminous depositions and affidavits filed in this cause. (R. 144) The additional discovery conducted by petitioner attempting to uncover the basis for the changed recollection of Mr. Will T. Cheek in regard to his luncheon conversation with Mr. Morrell did nothing more than substantiate the respondent's position.

The Tennessee Supreme Court by its denial of certiorari, and the Tennessee Court of Appeals and the trial court found that none of petitioner's proofs considered either singly or cumulatively, satisfies the constitutional standard with the convincing clarity necessary to raise a jury question as to whether the alleged defamatory falsehoods were published with knowledge that they were false or with reckless disregard of whether they were false or not.

To aid the Court in its analysis of the voluminous record in this cause, respondent sets forth the following analysis of the relevant affidavits and depositions, first as they relate to the article published by the respondent on May 30, 1974 and second as they relate to the article published by the respondent on May 31, 1974.

A. Summary of relevant depositions and affidavits in regard to the article of May 30, 1974.

The affidavit of Ed Long (R. 29), the reporter who wrote the May 30th article, the affidavit of Kenneth Morrell (R. 27), editor of The Nashville Banner, and their respective depositions clearly show that this article was written after an extensive investigation by Mr. Long at Mr. Morrell's direction and that

respondent had no knowledge that any statements contained in the article were false and did not print the article with reckless disregard for whether the statements contained in the article were false or not. In point of fact, the respondent had reasonable grounds to believe that all the statements contained in the article were in fact true. Petitioner complained of the statements contained in the sixth paragraph of the article which is set out in Paragraph 2 of the Complaint herein. (R. 7) The Tennessee Court of Appeals correctly found that petitioner was an active candidate for the Democratic nomination to the Supreme Court of Tennessee, since petitioner admitted this in his statement of the case filed in that Court.

The affidavits and depositions submitted by petitioner in opposition to the motion for summary judgment are not addressed to the issue of "actual malice." The first affidavit of petitioner (R. 51) may be summarized by saying that petitioner *believes* that the articles were published by the respondent without a valid basis and as part of a conspiracy to defame him and to prevent his nomination as a Democratic candidate to the Tennessee Supreme Court. Petitioner therein denies that he ever discussed with anyone the possibility of working a deal with the liberal element of the Executive Committee whereby a slate would include Russell Sugarman as Attorney General and petitioner as a Democratic nominee for the Tennessee Supreme Court. Petitioner further *believes* that the stories were published by respondent out of spite or malice to defeat him and without an attempt to ascertain the truth of the statements contained in the story. Lastly, petitioner's affidavit states that petitioner *believes* that the articles were not written by the respective reporters but were the product of the editor of the respondent and emanated from a controversy between respondent's editor and petitioner which began more than twenty years ago.

The most that can be said of petitioner's first affidavit is that he disputes the accuracy of the respective articles and believes that they were motivated by a long-standing controversy with the present editor of the respondent. Petitioner's belief as to the motivation behind the articles is not admissible evidence, and does not raise a genuine issue as to any material fact on the issue of actual malice when compared with the detailed, factual testimony of Mr. Morrell, Mr. Long and the other affidavits and depositions submitted by the respondent in support of its motion for summary judgment.

During petitioner's efforts to gain the nomination of the Democratic party for a seat on the Tennessee Supreme Court, he states, in substance, in his second affidavit (R. 78) that he and Mr. Charles Wiles, a former foreman of the local grand jury and prominent businessman, met with Mr. Will Cheek, Secretary of the Tennessee State Democratic Executive Committee. At that meeting, Mr. Cheek, according to petitioner, indicated his belief that the petitioner would help the "ticket" by balancing the slate (between the liberal and conservative elements) and offered his support to the petitioner, which was later withdrawn.

The petitioner states in that affidavit that Mr. Cheek asked if he would be willing to be one of the nominees along with a black nominee, and that he indicated that he would. In that affidavit, petitioner further denies ever discussing with Mr. Cheek a "package deal" focusing on the State Attorney General position as being the pawn that could push him on to the ticket and he further denies discussing the working of a deal with the liberal element of the Executive Committee whereby Russell Sugarman would be made Attorney General if a slate was selected including him as a Democratic nominee for the Tennessee Supreme Court.

Mr. Ken Morrell, editor of The Nashville Banner, testified in regard to a conversation he had with Mr. Will Cheek some week to ten days prior to publication of the May 30th article.

(Morrell Dep. 2/19/76, p. 5, 6) During that conversation, Mr. Cheek informed him that petitioner was actively seeking support for his candidacy from some members of the Executive Committee, and that some maneuvering was going on involving Russell Sugarman being named Attorney General if petitioner was a nominee for the Tennessee Supreme Court. On the basis of that conversation, Mr. Morrell assigned reporter Ed Long the task of investigating and preparing an article concerning these matters. (R. 32) (Morrell Dep., 2/19/76, p. 8) During Mr. Long's investigation, Mr. Morrell discussed the matter with Mr. Long on several occasions (Morrell Dep., 2/19/76, p. 8), and Mr. Morrell approved the article prior to its publication. (Morrell Dep., 2/19/76, p. 9) In his affidavit, Mr. Morrell stated that he neither knew nor had reason to believe that any of the statements in the article were false. (R. 27)

Mr. Ed Long, the reporter who wrote the article published on May 30, 1974, by deposition and affidavit corroborated Mr. Morrell's testimony that the article was an assignment made pursuant to a conversation between Mr. Morrell and Mr. Cheek concerning some talk about maneuverings to get the judicial nomination. (Long Dep., p. 15) Ronald Borod, Senator Willian Peeler, Will Cheek, Gilbert S. Merritt, Jr., Senator Ed Gillock, and John Wade are quoted in the May 30th article written by Mr. Long.

During Mr. Long's investigation, he spoke with former Lieutenant Governor Frank Gorrell, who told him, based on information he had received from people holding office in the Democratic party, that there was a lot of "wheeling and dealing" going on and that he thought most of it was on behalf of the plaintiff. (Long Dep., p. 17, 18) Mr. Long stated that he subsequently discussed this matter with Mr. Will Cheek who verified and amplified the information he had received from Mr. Gorrell. (Long Dep., p. 19) Mr. Cheek supplied Mr. Long's in-

formation concerning the package deal coming out of West Tennessee focusing on the State Attorney General position as being the "pawn" that could push one candidate onto the ticket. (Long Dep., p. 29)

Mr. Long also interviewed Senator Ed Gillock, who indicated the situation was "very, very fluid." (Long Dep., p. 23) In his affidavit, Mr. Long stated that he exercised reasonable care in conducting his extensive investigation and interviews concerning the events depicted in the article, and stated that he neither knew nor had reason to believe that any of the statements made in the article were false. (R. 29)

Thus, the record indicates that Mr. Long conducted an extensive investigation and obtained information from Mr. Will Cheek, Secretary of the Democratic Party, Senator Ed Gillock, Mr. Ron Borod, Senator William Peeler, Mr. Gil Merritt, Jr., (now Circuit Judge for the United States Court of Appeals for the Sixth Circuit), former Lieutenant Governor Frank Gorrell, and Vanderbilt Law School Dean, John Wade, all of whom are identified in the article with the exception of Frank Gorrell.

The inconsistent depositions of Mr. Will Cheek indicate that he knew of rumors of attempted vote-swapping or dealing for votes (Cheek Dep., 1/14/75, p. 5); that the petitioner and others were involved in the rumors of vote dealing (Cheek Dep., 1/14/75, p. 10); that he and petitioner had specifically discussed a balancing deal between the left and right wing of the party (Cheek Dep., 1/14/75, p. 14); that he had discussed matters involving the Tennessee Supreme Court with Mr. Morrell some week to ten days prior to publication of the May 30, 1974 article (Cheek Dep., 4/1/76, p. 7, 8); that he had speculated about the possibility of the petitioner attempting to put together a ticket of liberals and conservatives wherein petitioner would be the only nominee from West Tennessee which by tradition would leave the office of Attorney General to be filled by

a nominee from West Tennessee; that he had a conversation in his office with Mr. Wiles and the petitioner (Cheek Dep., 4/1/76, p. 59); and that he had discussed with petitioner himself the concept of petitioner's running with a black from Memphis (Cheek Dep., 4/1/76, p. 54, 55). Thus, Mr. Cheek testified that he did indeed inform Mr. Ken Morrell, editor of The Nashville Banner, of the information quoted in Paragraph 2 of the Complaint (Cheek Dep., 4/1/76, pp. 7-8, 54). Mr. Cheek further testified that the idea of a "slate" which would involve petitioner and a black from Memphis was discussed with and approved by petitioner long before Mr. Cheek informed Ken Morrell of this possibility (Cheek Dep., 4/1/76, pp. 54, 57-61, 63). Thus, Mr. Cheek not only confirms Mr. Morrell's testimony as to the initial source of the story alleged by petitioner to be false and defamatory, he states further that it was in fact true.

Mr. Cheek further corroborated certain remarks which were attributed to him in the article; he acknowledged that the tone of the quotation, "I haven't seen a block vote or 'slate' happen yet and I don't think it will because of the inter-personal relationship among Committee members," was correct, and he indicated that he did say something to that effect (Cheek Dep., 1/14/75, p. 4) Similarly, he acknowledged that he made a statement to the effect that "Judges are aware that this type of dealing is illegal, not to mention unjudicial." (Cheek Dep., 1/14/75, p. 5)

In short, Mr. Cheek's testimony corroborates the remarks in the article attributed to him and further corroborates the language to which petitioner has objected and alleges to be defamatory.

The affidavit of State Senator Ed Gillock (R. 58) submitted by petitioner in opposition to respondent's motion for summary judgment can be summarized by stating that in Senator Gillock's

"mind" the stories are an example of irresponsible journalism and an effort to control Democratic nominations. Senator Gillock is "satisfied" that petitioner never attempted to make a deal regarding a slate involving Mr. Sugarman and he never heard of such a proposition. Senator Gillock's affidavit is basically his own opinion or his "mind" as to what is and what is not responsible journalism and his opinion regarding what petitioner may or may not have done. Nothing in Senator Gillock's affidavit presents admissible evidence or raises a genuine issue as to material fact with respect to actual malice. Senator Gillock is merely reported in the article of May 30, 1974, as having stated that "the situation is very, very fluid at this time and that is all I can say."

The affidavit of former Lieutenant Governor Frank Gorrell (R. 63) submitted by petitioner in opposition to respondent's motion for summary judgment simply states that he has no personal recollection of discussing the matter of nominations to the Tennessee Supreme Court with either Mr. Kenneth Morrell or Mr. Ed Long, but that such conversation would certainly not have been unusual. Mr. Gorrell's affidavit does not dispute the evidence submitted by respondent in support of its motion for summary judgment on the issue of actual malice.

The affidavit of Drue Smith (R. 62) of the Capitol Hill News Corps, simply states that she has no recollection of hearing any conversation involving Senator Ed Gillock. The affidavit of Dean John Wade, (R. 65) Professor of Law at Vanderbilt University and Chairman of the Judicial Selection Commission, indicated that he received a call from a reporter from The Nashville Banner prior to the publication of the May 30, 1974, article inquiring whether any combination among particular candidates to establish a slate was being discussed or considered. Dean Wade indicated that he had no personal knowledge of this matter, but that such might be taking place. He did not recall making the specific statements attributed to him in the

article, but indicated he did provide the reporter with words of similar import. Dean Wade's affidavit does not raise a genuine issue as to material fact on the issue of actual malice but tends to support the assertion of the writer of the article of May 30, 1974.

Mr. Russell Sugarman, a black Memphis attorney, whose deposition was submitted by petitioner in opposition to respondent's motion for summary judgment, stated that he was a member of the Tennessee State Democratic Executive Committee, and that he was not a candidate for the Supreme Court or any other position. (Sugarman Dep., pp. 4, 5) Mr. Sugarman indicated that he had no knowledge or information about a package deal coming out of West Tennessee focusing on the State Attorney General position as being the "pawn" that could push one candidate onto the ticket. (Sugarman Dep., p. 8) While he was aware that petitioner was actively seeking the nomination, he never had any knowledge that petitioner was involved in any deal until he heard about the article published by the respondent on May 30, 1974. (Sugarman Dep., pp. 8, 9)

Mr. Null Adams, the political editor of The Memphis Press Semitar, stated that he knew nothing whatsoever about this case. (Adams Dep., p. 10)

Mr. Gil Merritt, a Nashville attorney and now Circuit Judge of the United States Court of Appeals for the Sixth Circuit, stated that he did not recall any specific knowledge of discussions about a deal coming out of West Tennessee and he did not recall talking to Reporter Long about the article appearing on May 30, 1974, but indicated that he may have talked to someone about the contents of the article. (R. 135)

Former State Senator William Peeler, an attorney in Waverly, Tennessee, was attributed with having made several statements appearing in the article of May 30, 1974. Although Mr. Peeler

stated that he had no independent recollection of making the statements, he assumed that he had made them. (Peeler Dep., p. 4) Mr. Peeler's deposition in fact supports respondent's contention that these articles were published by the respondent without "actual malice."

Petitioner's second affidavit (R. 77) submitted in opposition to respondent's motion for summary judgment does not aid petitioner's cause on the issue of actual malice and grossly violates Rule 56.05 of the Tennessee Rules of Civil Procedure. Petitioner's second affidavit is not based upon personal knowledge as required by Rule 56.05, but asserts and relies on the truth of charges about which petitioner does not claim to know anything. *See Washington Post v. Keogh, supra* at 971. Furthermore, the petitioner's second affidavit does not set forth facts admissible in evidence as the allegations are almost all hearsay.

Thus, the record clearly reveals that the article published by respondent on May 30, 1974, was not published with "actual malice." Petitioner failed to introduce any proof whatsoever that respondent knew the statements contained in the article were false or that respondent printed the article with reckless disregard for whether statements contained in the article were false or not. None of the proof introduced by petitioner satisfies the constitutional standards with the convincing clarity necessary to raise a jury question on the issue of "actual malice."

B. Summary of relevant depositions and affidavits in regard to the article of May 31, 1974.

The following summaries relate to the article published by The Nashville Banner on May 31, 1974, involving the alleged bribe attempt on Committeewoman Helen Brown to obtain her vote for the petitioner.

Fate Thomas, Sheriff of Davidson County, testified in his deposition that he was contacted by petitioner's friend, Mr. Charles Wiles, who asked that he set up a meeting with Democratic Executive Committeewoman, Mrs. Helen Brown, and others for the purpose of promoting petitioner's candidacy for the Supreme Court. (Thomas Dep., p. 21) Sheriff Thomas then testified that he contacted Metro Councilman Mansfield Douglas and requested that he arrange an interview with Mrs. Brown on behalf of petitioner.

Metro Councilman Mansfield Douglas indicated in his deposition that at the request of Sheriff Thomas he asked Committeewoman Brown to talk with petitioner about his candidacy. (Douglas Dep., p. 11) Douglas indicated that he may have commented to Mrs. Brown that Sheriff Thomas had been of assistance to her in her race for Committeewoman and that he could be expected to assist her again (Douglas Dep., p. 12), but this was only to qualify his request for her to meet with the petitioner, and not with the intent of offering to bribe Mrs. Brown. (Douglas Dep., pp. 12, 14) Mr. Douglas stated that he did not ask her to support petitioner (Douglas Dep., p. 16) but simply to meet with petitioner as a matter of courtesy. (Douglas Dep., p. 12)

The deposition of Mrs. Helen Brown is a virtual parallel of what was printed by respondent in the article published on May 31, 1974. Mrs. Brown testified that she was contacted by telephone by Mary Harrison on May 23, 1974, just as the Banner reported it in the article. (Brown Dep., p. 6) Just as the article reported, Mrs. Brown testified that a meeting was scheduled between herself and Mary Harrison for May 28. (Brown Dep., p. 7) Mrs. Brown stated that both Andrew Gardner and Mary Harrison met with her to solicit her support for the nomination of petitioner to the Tennessee Supreme Court. (Brown Dep., p. 10)

On page 10 of her deposition, Mrs. Brown outlines the substance of her conversation with Andrew Gardner and Mary Harrison. Just as the Banner reported in its article, Mrs. Brown testified that Mr. Gardner solicited her vote for Mr. Taylor and specifically asked her "how much financing it would take to get her vote." (Brown Dep., p. 10) The basic facts outlined on page 10 of Mrs. Brown's deposition are virtually identical to the facts set forth in the article published by the respondent on May 31, 1974.

In the article published by the Banner, Mrs. Brown stated that the man (later determined to be Andrew Gardner) telephoned her the following Thursday and again identified himself and inquired as to whether she had changed her mind to support the petitioner. She replied that she had not decided how she would vote at that time. Mrs. Brown's testimony in her deposition corroborates this and she specifically testified that Mr. Gardner did call her again the following Thursday to solicit her support for petitioner. (Brown Dep., p. 18) As the article reported, she testified that she told Mr. Gardner when he called that she had not made up her mind about petitioner at that time. (Brown Dep., p. 18)

In the article published by the Banner Mrs. Brown is quoted as saying that her vote was not for sale, and in her deposition she likewise testified that she told Gardner her vote was not for sale. (Brown Dep., p. 10) Mrs. Brown stated that Mr. William Taylor, a friend who was sitting in an adjoining room at the time of the meeting, did not hear the bribery offer. (Brown Dep., p. 12)

She subsequently told Mr. Will Cheek of the attempted bribe, (Brown Dep., p. 15) and she contacted Gil Merritt to make a statement in order to protect herself. (Brown Dep., pp. 16, 21) Mr. Merritt and Mrs. Mary Shafner subsequently came to her home and the statement was prepared. (Brown Dep., p. 21)

On Friday morning, May 31, 1974, Mrs. Brown talked by phone to a reporter of The Nashville Banner, possibly Larry Brinton. (Brown Dep., p. 22) Mrs. Brown subsequently went to the District Attorney's Office where she was interviewed about the alleged bribe attempt. (Brown Dep., p. 26) She indicated that she remembered Mrs. Harrison's name, because she had written it down in her appointment book and that she recognized Mr. Gardner when she saw him at the courthouse. (Brown Dep., p. 27)

In marked contrast to the deposition of Mrs. Helen Brown are the depositions of Mary E. Harrison and Andrew Gardner. Throughout Mrs. Harrison's deposition she invoked the Fifth Amendment privilege against self-incrimination and refused to discuss any of the events which took place at the meeting among herself, Mr. Gardner and Mrs. Brown.

Mr. Gardner similarly invoked his Fifth Amendment privilege against self-incrimination throughout his deposition. At times, however, during Mr. Gardner's deposition, he did answer some of the questions posed to him by counsel. For example, Mr. Gardner was being probed by counsel as to whether he had discussed with Mrs. Helen Brown the necessity or the importance of knowing or having friends in the court, like the court officers. At first, Mr. Gardner denied that he had had such a discussion, but when pressed by counsel, he stated:

> I told her (Mrs. Brown) if she would turn us a favor, and if we needed a favor we would help her we might.

(Gardner Dep., p. 41) This statement by Gardner constitutes an admission that he and Mrs. Harrison had offered Mrs. Helen Brown favors in return for her support for the petitioner.

Mr. William Taylor stated in his deposition that he was at Mrs. Brown's home when the alleged bribe attempt occurred. (William Taylor Dep., p. 4) He further testified that at one

point during the meeting with Mr. Gardner and Mrs. Harrison, Mrs. Brown came to him and asked, "Did you hear what they said? That man tried to offer me some money." (William Taylor Dep., p. 7) Mrs. Brown had told him that they were coming to talk to her about petitioner's candidacy for the Supreme Court. (William Taylor Dep., p. 5)

Mrs. Gena Carter, a member of the Judicial Selection Commission, stated in her deposition that prior to publication of the article, Mrs. Brown told her that two people had discussed petitioner's candidacy with her and inquired as to how she stood on his candidacy and that they in fact "offered to—wanted to buy her vote and that she told them her vote was not for sale." (Carter Dep., p. 6) When Mrs. Brown desired legal assistance, Mrs. Carter called Mary Shafner for assistance.

Mrs. Mary Shafner assisted Mr. Gil Merritt in his activities with the Judicial Selection Commission, and she stated in her deposition that on the evening of May 30, 1974, she accompanied Mr. Merritt to Mrs. Brown's home to take her statement. (Shafner Dep., p. 6) She indicated that she witnessed the statement given to Mr. Merritt by Mrs. Brown. (Shafner Dep., pp. 6, 7) She further stated that after taking the statement, she accompanied Mr. Merritt to the home of Democratic Chairman James Sasser (now United States Senator from Tennessee) to show him the statement. (Shafner Dep., p. 8)

Mr. Gil Merritt, counsel for the Judicial Selection Commission, and now Circuit Judge for the United States Court of Appeals for the Sixth Circuit, stated in his deposition that on May 30, 1974, Mrs. Shafner told him that Mrs. Brown had been approached, purportedly on behalf of petitioner, and offered money for her vote in favor of petitioner. (Merritt Dep., 1/14/75, p. 6) Mr. Merritt and Mrs. Shafner went to see Mrs. Brown, (Merritt Dep., 1/14/75, p. 7) obtained her statement, and took the statement to James Sasser that same evening. (Merritt Dep., 1/14/75, pp. 7, 8) He and James Sasser decided

to turn the statement over to the District Attorney the next morning. (Merritt Dep., 1/14/75, p. 9) Mr. Merritt could not recall giving any statement to the press in regard to the May 31, 1974 article. (Merritt Dep., 1/14/75, pp. 10, 11)

Mr. James Sasser was Chairman of the Tennessee State Democratic Executive Committee at the time of publication of the May 31, 1974 article. Mr. Sasser testified in his deposition that on the evening of May 30, 1974, Mr. Merritt and Mrs. Shafner came to his home with a statement obtained from Mrs. Brown, and that he and Mr. Merritt discussed the statement and decided to meet with Attorney General Thomas Shriver the following morning. (Sasser Dep., 1/14/75, pp. 6, 7) The following morning they went to General Shriver's office and presented the statement to him. (Sasser Dep., 1/14/75, p. 7) He subsequently spoke to Larry Brinton, reporter for the respondent, about this matter. (Sasser Dep., 1/14/76, p. 8)

District Attorney General Thomas Shriver's deposition lends further credence and support to the story told by Mrs. Brown during her deposition and as reported in The Nashville Banner. General Shriver relates in his deposition that Gil Merritt and James Sasser came to his office on the morning of May 31, 1974, and brought a signed statement taken by Mr. Merritt from Helen Brown concerning the facts of the alleged attempt by Mr. Gardner and Mrs. Harrison to buy her vote. (Shriver Dep., 1/14/75, p. 5) After a lengthy discussion, and after determining that Mrs. Brown was a credible witness and that the public had the right to know of the charges that had been made by Mrs. Brown, General Shriver called Ken Morrell, editor of The Nashville Banner. (Shriver Dep., 1/14/75, pp. 6, 7) Thereafter, Larry Brinton, a reporter for The Nashville Banner, called General Shriver back to check out the story which was published on May 31, 1974.

General Shriver testified that Helen Brown took and passed a polygraph examination concerning the events described in her

deposition and described in the article published by The Nashville Banner on May 31, 1974. (Shriver Dep., 1/14/75, p. 15) By contrast, General Shriver stated that Mr. Gardner would not take a polygraph examination concerning the events described by Mrs. Brown. (Shriver Dep., 1/14/75, p. 19) General Shriver further concluded that Mrs. Brown was telling the truth after studying the answers of her polygraph test. (Shriver Dep., 1/14/75, pp. 20, 21) In response to questioning by counsel for the petitioner, General Shriver stated that petitioner was a man who was desperate to get on the Supreme Court and also that he was a man who had an overpowering ambition to be on the Court. (Shriver Dep., 1/14/75, p. 9)

Reporter Larry Brinton, author of the May 31, 1974 article, stated that he conducted an extensive investigation of the events described in the article and had no reason to doubt the credibility of the people he interviewed or quoted in the article. (R. 31) His affidavit basically states that the article was published without actual malice and that he had no knowledge that any statements contained in the article were false and did not print the article with reckless disregard for whether statements contained in the article were false or not.

IV. The Tennessee Court of Appeals Correctly Held as a Matter of Law That the Article of May 31, 1974, Was Not Defamatory of Petitioner and Did Not Err in Not Reaching Any Conclusion on the Issue of Whether the Article of May 30, 1974, Was Defamatory of Petitioner.

Petitioner charged that both of the articles charged petitioner with the crime of bribery and were thus defamatory per se. Respondent submits that the trial court correctly decided as a matter of law that the clear and unambiguous language contained in both articles was not capable of being interpreted as defama-

tory toward petitioner. The statements claimed to be defamatory by petitioner when read in the sense that the readers to whom the article was addressed would understand it, simply does not amount to a charge of bribery (R. 152). No reader could have thought that the newspaper articles were charging petitioner with the commission of the criminal offense of bribery.

A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. *Black v. Nashville Banner Pub. Co.*, 24 Tenn. App. 137, 141 S.W.2d 908, 913 (1940). Where the language complained of is clearly unambiguous, its meaning and character presents a question of law for the court. *See Brown v. Newman*, 224 Tenn. 197, 457 S.W.2d 120, 122 (1970) and *see also Williams v. McKee*, 98 Tenn. 139, 38 S.W. 730, 731 (1897).

Applying these principles, the Tennessee Court of Appeals examined the article of May 31, 1974, and noted that it was true that the article clearly and unambiguously reports charges of bribery. The Court of Appeals further correctly concluded that those charges were clearly not leveled at petitioner as the article stated that two people tried to buy a vote for petitioner, not that petitioner tried to buy a vote. The Tennessee Court of Appeals correctly concluded that the article certainly could not be construed as a defamation of petitioner.

In regard to the article published May 30, 1974, petitioner complained of specific language set forth in paragraph 2 of his complaint as follows:

> Taylor is actively seeking the nomination, possibly by working a deal with the liberal element of the Executive Committee whereby selection commission member Russell Sugarman, a black, would be Attorney General if a 'slate' is selected including Taylor.

Petitioner charged that the above statement amounted to a charge by respondent that petitioner had committed the crime of bribery under the Election Code. The Court of Appeals did not reach a conclusion as to whether or not the article of May 30 was dafamatory of petitioner, since they found that there was no genuine issue as to material fact on the issue of actual malice and that the publication of the article was therefore constitutionally privileged. While respondent believes that the trial court correctly held that the language complained of by petitioner in the article of May 30, was clear and unambiguous, did not charge petitioner with the crime of bribery, and was not defamatory as to petitioner, the refusal of the Tennessee Court of Appeals to make a determination as to whether that article was defamatory of petitioner was not error, since the Tennessee Court of Appeals had already determined that the article was published without actual malice and was constitutionally privileged.

V. This Court Should Deny Certiorari Because the Tennessee Court of Appeals Did Not Weigh the Evidence or Judge the Credibility of Witnesses in Holding That There Was No Genuine Issue of Material Fact as to Actual Malice.

In reviewing the trial court's decision on respondent's Motion for Summary Judgment, the Tennessee Court of Appeals noted that the party moving for summary judgment has the burden of showing that no genuine issue of material fact exists and that the court must view the record in the light most favorable to the motion's opponent. The Court of Appeals observed that the only conflict in the evidence that was not arguably material was the inconsistency in the depositions of Will Cheek. This was the only evidence that could have been weighed

or evaluated on the basis of credibility. Petitioner argued that the inconsistent depositions of Will Cheek, when viewed in the light most favorable to petitioner, raised an issue of material fact as to actual malice.

The Tennessee Court of Appeals analyzed the inconsistent depositions of Will Cheek and viewed them in the light most favorable to petitioner. In Cheek's first deposition taken on January 14, 1975, he denied that he passed on to anyone the rumor that petitioner was involved in such maneuvering as the article reported and stated that he did not believe that petitioner was so involved. In Cheek's deposition taken on April 1, 1976, after his recollection had been refreshed, he testified that he had speculated about petitioner to Ken Morrell, respondent's editor, along the lines reported in the article. Cheek's second deposition was corroborated by the depositions of Ken Morrell and Ed Long.

The Tennessee Court of Appeals noted the rule in Tennessee that contradictory statements of a witness in connection with the same fact have the result of cancelling each other out. Unexplained conflicting statements of a witness nullify each other, and are entitled to no weight as evidence unless corroborated. *Nashville and American Trust Company v. Aetna Casualty and Surety Company*, 21 Tenn. App. 366, 110 S.W. 2d 1041, 1046 (1937). *See also Degrafenreid v. Nashville Ry. and Light Company*, 162 Tenn. 558, 39 S.W.2d 274 (1931), and *Johnston v. Cincinnati, N.O. & P.P. Ry. Co., et al.*, 146 Tenn. 135, 240 S.W. 429 (1922). The question here is not one of the credibility of a witness or of the weight of evidence; but it is whether there is any evidence at all to prove the fact. If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies; but if the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is

no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way. *Degrafenreid v. Nashville Ry. and Light Company, supra*, 39 S.W.2d at 275.

In the instant case, the Tennessee Court of Appeals noted that the inconsistency in Cheek's testimony was explained by his refreshed recollection. The Court of Appeals further noted that Cheek's testimony in his second deposition is corroborated by that of Morrell and Long, while the testimony of his first deposition is uncorroborated.

Even though the inconsistency in Cheek's testimony was explained and the testimony in his second deposition was corroborated, the Court of Appeals applied the above cited case law and disregarded the inconsistent testimony of Cheek, since this was to view the evidence in a light as favorable to petitioner as required by the summary judgment standard and perhaps more so. When the cancelling out rule was applied the court could look only to the testimony of Morrell and Long that Cheek related to respondent the substance of the story published by respondent about petitioner and the Attorney General "deal." With the only evidence indicating that the source of the story was the Secretary of the State Democratic Executive Committee, the Court of Appeals correctly concluded that there was no doubt that there was no genuine issue of material fact and that respondent published the May 30 article without actual malice.

VI. **The Tennessee Court of Appeals Correctly Affirmed the Trial Court's Granting of Summary Judgment for Respondent on the Cause of Action for Intentional Interference With Prospective Advantage Sought to Be Pleaded by Petitioner by Way of Amendments to His Original Complaint.**

By way of amendments to his original complaint petitioner sought to plead a tort which appears to be intentional interference with prospective advantage, or, more specifically, the tort of injurious falsehood which is merely a species of intentional interference with prospective advantage. The Tennessee Court of Appeals observed that petitioner presented no evidence to raise an issue of material fact on any of the elements of that tort in the instant case. Further, the Court of Appeals noted that petitioner cited no authority in support of that cause of action or even to show that such a tort is recognized in Tennessee. In addition, the Court of Appeals agreed with the trial court that the First Amendment not only protects respondent against a charge of libel in this case, but it also protects respondent against liability for this tort.

The constitutional privilege requiring plaintiffs to prove actual malice with convincing clarity is not confined to the tort of libel. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), this Court extended the constitutional privilege to include the tort of invasion of privacy. In general, it may be said that injurious falsehood, which is a tort that never has been greatly favored by the law, is subject to all of the privileges recognized both in cases of personal defamation and in those other types of interference with economic advantage. W. Prosser, The Law of Torts, 4th Ed., §128 (1971). No matter what legal garb petitioner sought to dress his complaint in, it was incumbent upon the petitioner to prove actual malice with convincing clarity and he completely failed to do this. The Court of Appeals thus correctly refused to remand the case back to the trial court for trial of the cause of action for intentional interference with prospective advantage, and correctly affirmed the trial court's granting of summary judgment to respondent on this cause of action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Robert L. Taylor,
Plaintiff-Appellant,
v.
Nashville Banner Publishing Company,
Defendant-Appellee.
} Davidson Law

Court of Appeals of Tennessee
Middle Section at Nashville

Appealed From the Second Circuit Court for Davidson County, Tennessee, The Honorable Hal Hardin, Judge.

Filed: March 31, 1978

Fyke Farmer, 1122 Stahlman Building, Nashville, Tennessee 37201, Attorney for Plaintiff-Appellant.

James F. Neal and Jon D. Ross, Neal & Harwell, 800 Third National Bank Building, Nashville, Tennessee 37219, Attorney for Defendant-Appellee.

Affirmed.

FRANK F. DROWOTA, III
Judge

OPINION

(Filed March 31, 1978)

This is an appeal by plaintiff, a public figure, from a summary judgment dismissing with prejudice his libel suit against defendant newspaper.

Plaintiff Robert L. Taylor is a well-known attorney, a former Chancellor, and a former judge of the western section of this Court. He once unsuccessfully sought the Democratic nomination for governor of Tennessee. In the spring of 1974, he was an active candidate for the Democratic nomination to the Supreme Court of Tennessee. Defendant Nashville Banner Publishing Company (Banner), one of two daily newspapers in Nashville, published two articles containing material allegedly defamatory of plaintiff on May 30 and May 31, 1974. The articles dealt with events surrounding the selection of Democratic candidates for the Supreme Court.

The Tennessee Supreme Court is composed of five judges, "of whom not more than two shall reside in any one of the grand divisions of the State." Tennessee Constitution Art. 6, § 2. Supreme Court judges are to be "elected by the qualified voters of the State" according to such rules as the legislature prescribes. Tennessee Constitution, Art. 6, § 3. Article 6, § 5 of the State Constitution provides that the judges of the Supreme Court shall appoint the Attorney General of the State. By tradition, the Attorney General is appointed from the one grand division, east, middle, or west, that is represented by only one Supreme Court judge.

At one time, judges of all the appellate courts of this State were chosen by means of a merit selection plan. This plan, set out in T.C.A. §§ 17-701-17-716, provides for the governor to fill judicial vacancies by appointing one person from a group of three recommended by the appellate court nominating commission, a body established by the statute. The appointee then appears on the next general election ballot to be accepted or rejected by the voters on a "yes/no" basis. While this system still applies to intermediate appellate courts, the legislature in 1974 excepted the Supreme Court judges from its operation. The result is that Supreme Court judges are selected in popular, contested elections much like holders of political offices in the executive and legislative branches of government.

In the spring of 1974, the State's political parties were anticipating the election of Supreme Court judges to be held in August of that year. The Tennessee State Democratic Executive Committee, which was to choose its party's five nominees for the Court, had scheduled a meeting in Nashville for that purpose for June 1, 1974. The Committee had received from a special Judicial Selection Commission the names of eight people recommended as qualified for the Court. Plaintiff Taylor's name was not one of the eight names submitted. The Executive Committee was not absolutely bound to choose its five nominees from among the eight recommended, however, and plaintiff remained an active candidate.

In the context of this political nominating process, the Banner published the first story of which plaintiff complains on May 30, 1974. The gist of the story was that a great deal of political maneuvering was occurring in Democratic ranks with respect to the Supreme Court nominations. In the part of the story particularly complained of by plaintiff, and alleged to be defamatory of him, it is stated that plaintiff was actively seeking the nomination, "possibly by working a deal with the liberal element of the executive committee whereby . . . Russell Sugarman, a black, would be made attorney general" if plaintiff were nominated to the Court. The entire article is reprinted in an appendix to this opinion, and is further discussed below.

On May 31, 1974, the day before the Executive Committee meeting, the Banner published the second article of which plaintiff now complains. The article told of bribery charges lodged with the District Attorney General in Nashville by a member of the Democratic Executive Committee. The Committee member, it was reported, "said an attempt was made this week to 'buy my vote' for Memphis Attorney, Robert

Taylor" by an unidentified man and woman. The article went on to describe in detail the attempted bribe, the Committee member's refusal, and her filing of a statement with District Attorney General Shriver, who was said to be investigating the matter. The entire article is reproduced in the appendix to this opinion.

At the June 1 meeting, the Executive Committee chose its five nominees from the list of eight recommended. Plaintiff was not one of the five chosen. All five Democratic candidates were successful in the August election, and they constitute our present Supreme Court.

On May 27, 1975, plaintiff brought the instant libel suit against the Banner in Davidson County Circuit Court, alleging that the articles of May 30 and 31, 1974, defamed him. Plaintiff claimed in his complaint that the articles injured his reputation and resulted in his failing to get enough Executive Committee votes for nomination. He asked $500,000.00 in compensatory and punitive damages. The complaint was amended, in March of 1976, to allege that the articles were published "maliciously," that they were "calculated by the defendant to injure plaintiff's candidacy for nomination," and that they "did produce actual damages to the plaintiff by causing him to fail to secure enough votes."

Defendant Nashville Banner took the position that the constitutional privilege first established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), applied, and that there was no evidence of "actual malice" as defined in that case. On October 8, 1975, defendant filed its motion for summary judgment. Two grounds for dismissal were asserted: (1) that the language complained of is unambiguous and not defamatory; and (2) that there is no genuine issue of material fact on the issue of actual malice. In support of its motion, defendant attached certain affidavits and depositions. The depositions were

ones taken early in 1975 in the case of *Taylor v. Tennessee State Democratic Executive Committee*, a suit brought by plaintiff in the Chancery Court for Shelby County. Because it perceived the case as a serious and unusual one, the trial court permitted the parties to engage in very extensive discovery over a long period of time before ruling on the summary judgment motion. Further discovery consisted in large part of new depositions, including fresh testimony from some of those whose depositions in the Chancery case had already been submitted.

On January 5, 1977, the trial court filed a lengthy memorandum opinion in which it sustained defendant's motion for summary judgment on all grounds as to both articles. The opinion contains an orderly and thorough presentation of the facts, and an accurate and extensive discussion of applicable law. It also embodies the court's conclusion that the articles in question are not defamatory of plaintiff, and that there is absolutely no evidence to indicate that plaintiff could prove that defendant published them with "actual malice" within the meaning of *New York Times Co. v. Sullivan, supra.* In accordance with this opinion, the court on January 7, 1977, entered an order granting defendant's motion for summary judgment and dismissing the case. Plaintiff has appealed.

Plaintiff has raised five assignments of error in this Court. In the first, plaintiff complains of the trial court's conclusion that the articles are not defamatory of him. In the second assignment he disputes the conclusion that there is no genuine issue of material fact on the question of actual malice. In the third assignment plaintiff alleges that the trial court erred in refusing to allow him to amend his complaint, while in the fourth he complains that the trial court improperly weighed the evidence and determined the credibility of the witnesses. In the fifth assignment of error plaintiff simply avers that the trial court erred in granting summary judgment. We will examine

the May 30 article in the light of the first two assignments of error, and then proceed to treat the May 31 article in the light of the same two assignments. Finally, we will examine plaintiff's third, fourth and fifth assignments of error.

Summary judgment is to be rendered by a trial court only when it is shown that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." T.R.C.P. 56.03. The summary judgment procedure is not to be regarded as a substitute for trial of disputed factual issues. *Evco Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975); *Layhew v. Dixon*, 527 S.W.2d 739 (Tenn. 1975). The party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists, and in ruling on the motion the court must view the record in the light most favorable to the motion's opponent. *Lucas Brothers v. Cudahy Co.*, 533 S.W.2d 313 (Tenn. App. 1975). With this standard in mind, we turn to the merits of plaintiff's appeal.

The Article of May 30, 1974

In his first assignment, plaintiff contends that the trial court erred in concluding that the article of May 30, 1974, is not defamatory of him. Plaintiff points especially to the sixth paragraph of the article. The first six paragraphs read as follows:

> Intense political maneuvering that has been termed by one insider as "a hell of a lot of dealing" may determine the nominations for the State Supreme Court.
>
> Jockeying, dealing and political pressure are all part of the picture as candidates are attempting to be selected by the State Democratic Executive Committee for the five slots on the ticket for the high court.
>
> The 36 member committee meets here Saturday to narrow a list of eight candidates recommended by the Judicial Selection Commission to five nominees.

> But there are some other persons with hats in the ring. And through these persons, deals are being discussed. A "package deal" coming out of West Tennessee focuses on the state attorney general position as being the pawn that could push one candidate onto the ticket.
>
> Indications from Memphis are that former chancellor Robert L. Taylor is attempting to get enough votes to overthrow the recommendation of Justice William H. D. Fones.
>
> Taylor is actively seeking the nomination possibly by working a deal with the liberal element of the executive committee whereby Judicial Selection Commission member Russell Sugarman, a black, would be made attorney general if a "slate" is selected including Taylor.

Plaintiff's primary argument is that the article charges him with a crime, which of course would make it clearly defamatory. Plaintiff alleges that the article charges him with the crime of bribery, citing T.C.A. §2-1927. It is doubtful, but arguable, that the conduct attributed to plaintiff by the article is proscribed by that statute.

Furthermore, although plaintiff has not raised the point, this Court recognizes that the May 30 article may easily be understood as charging that plaintiff was guilty of conduct contrary to accepted and published standards of conduct for candidates for judicial office. During May, 1974, the conduct of judges and candidates for judicial office was governed by Rule 38 of the Supreme Court of Tennessee, which then read in part as follows:

> The ethical standards relating to the administration of the law in this Court, shall be the Canons of Judicial Ethics of the American Bar Association now in force, and as hereafter modified or supplemented.

Candidacy for judicial office was specifically governed by Canon 30 of the Canons of Judicial Ethics of the American Bar Association, which read in pertinent part:

> A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power . . . and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

It may be that the May 30 article in effect charges that plaintiff violated this ethical provision by promising to support and vote for Mr. Sugarman as Attorney General if plaintiff were nominated and elected to the Supreme Court. If so, this is a powerful argument in favor of the conclusion that the article is defamatory.

On the other hand, it could be argued that the article must be considered in the context of the politics surrounding major party nominations for high state office, a context clearly delineated in the article as a whole. It is not customary to consider judges and candidates for judicial office in the context of such partisan politics. The judicial function is to interpret and apply the law and to administer justice in a manner that is independent of all considerations save fairness and logic. It is primarily for this reason that the conduct of judges is restricted by many rules, such as the Canons of Judicial Ethics referred to above, which do not bind those in the legislative and executive branches, the function of whose members is to formulate into law and carry out the subjective wishes of the people who elect them. Nevertheless, partisan politics is the context in which candidates for the Supreme Court in 1974 were placed by the use of a "popular election" as the selection process for Supreme Court judges. In such a political context, the disgrace involved in the type of "dealing" attributed to

plaintiff in the May 30 article is arguably less than would otherwise be the case with a candidate for judicial office under the "merit" form of selection. This is particularly true when, as here, the alleged deal involved the selection of Attorney General, which is in the nature of an administrative rather than a judicial function of the Supreme Court.

Of the three members of this panel, Judge Todd feels strongly that the May 30 article is defamatory, primarily on the ground that the article in effect charges plaintiff with violating Canon 30, *supra*. Contrary to the statements in his separate concurring opinion, however, the other two members of this panel neither condone violations of the Code of Judicial Conduct nor would we be unwilling to condemn such violations in a proper case. In this case we simply feel that since the trial court's judgment in defendant's favor must be affirmed with regard to the May 30 article on the issue of actual malice, discussed next, it would serve no useful purpose to reach a conclusion on the issue of whether that article is defamatory. Accordingly, we pretermit any further discussion of the facts or law related to this issue.

Plaintiff's next argument is that the trial court erred in concluding that there exists no genuine issue of material fact on the question of whether defendant published the May 30 article with actual malice. We disagree. We hold that, due to the absence of competent evidence that the May 30 article was published with actual malice, defendant's publication of it is protected by constitutional privilege.

Constitutional privilege was first articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), wherein the Court held that a plaintiff who was a public official could not recover for defamatory statements relating to his official conduct unless he could prove that they were published with "actual malice," defined as knowledge of the statements' falsity or reckless disregard for whether they are false or not. 376 U.S. at 279-80.

This rule, based on the First Amendment guarantees of free expression, was soon extended to apply to public figures who are not public employees in cases such as *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The Court has defined "reckless disregard" as a "high degree of awareness of probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). In this regard, the Court has also stated that

> [t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

In the instant case, plaintiff does not deny that he is a public figure for purposes of the *New York Times* doctrine. Rather, he argues that the inconsistent depositions of Will Cheek, when viewed in the light most favorable to him, raise an issue of material fact as to actual malice.

It was the testimony of both Ken Morrell, defendant's editor, and Ed Long, its reporter, that Will Cheek, the Secretary of the State Democratic Executive Committee, was the only source for the May 30 article's connection of plaintiff with a "deal" involving the office of Attorney General. The record contains two depositions of Cheek's, one taken on January 14, 1975, and the other on April 1, 1976. In the first deposition, Cheek categorically denied that he passed on to anyone a rumor that plaintiff was involved in such maneuvering as the article reported, stating that he did not believe that plaintiff was so involved. In the second deposition, taken more than a year later but after discussions with several people had allegedly refreshed Cheek's recollection, Cheek testified that he had "speculated" about plaintiff to Ken Morrell, defendant's editor, along the lines reported in the article.

Plaintiff would have us allow for the possibility that a jury might believe only the statements in Cheek's first deposition to

the effect that he never told defendant that plaintiff was involved in a "deal." Believing that, plaintiff argues, a jury could then disregard the additional testimony of Morrell and Long and conclude that defendant had no source at all for the May 30 article. On this conclusion, says plaintiff, a finding of actual malice might be predicated. This position, however, overlooks legal authority of long standing in Tennessee.

It is a rule of law in this state that contradictory statements of a witness in connection with the same fact have the result of "cancelling each other out." *DeGrafenreid v. Nash. Ry. & Lt. Co.*, 162 Tenn. 558, 39 S.W.2d 274 (1931); *Johnson v. Cincinnati N. O. & T. P. Ry. Co.*, 146 Tenn. 135, 240 S.W. 429 (1922); *Donaho v. Large*, 25 Tenn. App. 433, 158 S.W.2d 447 (1941); *Southern Motors, Inc. v. Morton*, 25 Tenn. App. 204, 154 S.W.2d 801 (1941); *Nashville & American Trust Co. v. Aetna Cas. & Sur. Co.*, 21 Tenn. App. 366, 110 S.W.2d 1041 (1937).

> The question here is not one of the credibility of a witness or of the weight of evidence; but it is whether there is any evidence at all to prove the fact. If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies; but if the proof of a fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way.

Johnson, supra, 146 Tenn. at 158, 240 S.W. at 436. As can be seen from the quoted paragraph, this rule of "cancellation" is usually stated as applying only when the inconsistency in the witness's testimony is unexplained and when neither version of his testimony is corroborated by other evidence. In the instant case, the inconsistency in Cheek's testimony is explained by his

refreshed recollection. The testimony in his second deposition is corroborated by that of Morrell and Long, while the testimony of his first deposition is uncorroborated. Thus, there exist both explanation and corroboration, but both point in favor of the veracity of Cheek's second deposition, the existence of a reasonable source for the article, and the absence of an issue of material fact with regard to actual malice.

Under these circumstances, a jury could not be permitted to credit the first deposition of Cheek to the exclusion of all the evidence conflicting with it. To apply the rule of *Johnson, supra*, and disregard the inconsistent testimony of Cheek *in toto* is to view the evidence in a light as favorable to plaintiff as the summary judgment standard requires, and perhaps more so. Disregarding Cheek's inconsistent testimony, we are left with the testimony of Morrell and Long that Cheek related to defendant the substance of the story it published about plaintiff and the Attorney General "deal." With the only evidence indicating that the source of the story was the Secretary of the State Democratic Executive Committee, there is no doubt that there exists no genuine issue of material fact as to whether defendant published the May 30 article with knowledge of its falsity or with such reckless disregard for its truth or falsity as to constitute actual malice.

Since a proper view of the evidence reveals no support for the proposition that defendant published the May 30 article with actual malice, it follows that the trial court was correct in granting summary judgment in defendant's favor with regard to the libel claim based on that article.

The Article of May 31, 1974

Rather than reporting possible political "deals" connected with the Democratic nominations for the Supreme Court, the May 31 article discusses the much more serious matter of bribery. The thrust of the article, reproduced in its entirety in the appendix to this opinion, appears in its initial paragraph:

> A member of the State Democratic Executive Committee today said an attempt was made this week to "buy my vote" for Memphis Attorney Robert Taylor in Saturday's committee election for State Supreme Court nominees.

The article goes on to report that the Committee member was approached by two people who offered her "financing" if she would vote for plaintiff, and that she had informed the District Attorney General, who was investigating.

Again, plaintiff's first argument is that the trial court was wrong to conclude that this article is not defamatory. We cannot agree with plaintiff. It is true that the article clearly and unambiguously reports charges of bribery. But, just as clearly, those charges are not levelled at plaintiff. The article says that two people tried to buy a vote *for* plaintiff, not that plaintiff tried to buy a vote. In the context of the article, which nowhere even intimates a connection between plaintiff and the two unnamed persons who attempted the bribe, the quoted paragraph can only mean that a vote in favor of plaintiff was attempted to be bought, not that plaintiff was behind the attempt. This certainly cannot be construed as a defamation of plaintiff.

Moreover, defendant is clearly protected by constitutional privilege here. Again, plaintiff does not deny that he is a public figure for purposes of the *New York Times* doctrine. The trial court found that there was no issue of material fact on the question of actual malice, and we agree.

There is no question that a member of the Executive Committee went to District Attorney General Shriver with allegations of attempted bribery against two people, as the May 31 article reported. The record shows that defendant obtained

information about these charges from Shriver himself. The existence of the allegations and the investigation is clearly documented. It is equally clear that the gist of the allegations made to Shriver was that someone had attempted to pay a member of the Committee to vote in favor of plaintiff's nomination. Indeed, the evidence unequivocally supports not only the proposition that the published report of the allegations was true, but also the proposition that the allegations themselves were entirely true. Thus, defendant might well be entitled to an absolute defense at common law because of the truth of the matter published. At the very least, the substantial veracity of the May 31 article combined with the highly credible nature of its main source, the District Attorney General, supports the trial court's conclusion that, as a matter of law, plaintiff could not prove "actual malice" in the sense of *New York Times* and its progeny.

We hold that defendant's publication of the May 31 article was constitutionally protected as a matter of law because of the absence of any issue of material fact with respect to actual malice. The trial court's grant of summary judgment was correct, and must be affirmed on this basis. Our conclusion renders it unnecessary for us to consider plaintiff's rather lengthy arguments on other matters, such as the applicability of the non-constitutional privilege to publish comments on official proceedings.

Assignment of Error III

Plaintiff contends that the trial court erred in refusing to allow him to amend his complaint. The record shows that plaintiff did amend his complaint once by leave of court in March 1976, as we have noted above. The subject of this assignment of error, however, is a motion which plaintiff filed November 5, 1976, and which simply says, "The plaintiff Robert L. Taylor moves for leave to amend his complaint in

this case." The substance of the proposed amendment is not attached, nor does it appear in the record at all until the very end, where it is attached to plaintiff's petition to rehear. Nowhere in the record is there a ruling of the trial court on the motion. The transcript of a hearing held on another motion on November 12, 1976, contains reference to a motion to amend by plaintiff, but again the substance is lacking and no ruling appears.

In these circumstances, it would be impossible for this Court to reverse the trial court for failing to allow the amendment, even if it were clear that the court did fail to do so. Unless the record before us shows the substance of a proposed amendment and that it was filed in the trial court, we cannot determine what was before that court or whether the court acted properly on the motion to amend. The proper way to request the court for leave to amend under Rule 15 is to attach a copy of the proposed amendment to the motion so that it becomes part of the record at that time, regardless of what action the trial court takes or fails to take on it. This procedure ensures that the appellate courts know exactly what amendment the trial court was asked to allow. It is only with such knowledge that the trial court's decision can be reviewed.

Even assuming that the amendment appearing in plaintiff's motion to rehear was before the trial court as plaintiff contends, however, plaintiff has not been prejudiced in regard to it. First, while the trial court never expressly ruled on the motion to amend, the memorandum opinion indicates that the amendment was not denied but was considered by the court. The memorandum states that "[e]very indulgence has been allowed the plaintiff, including amendments to the complaint. . . ." (emphasis added). Since only one amendment, which was allowed, appears in the record, the inference is that the trial court considered that plaintiff's second motion to amend had been granted.

In addition, plaintiff would not have been unfairly prejudiced even had his second motion to amend been denied. The material factual allegations of the second amendment, as it appears in the petition to rehear, were already at issue. In the final paragraph of the proposed amendment, it is stated that defendant intentionally made false statements knowing they would injure plaintiff's chances of being nominated, and that the statements did result in his failure to be nominated. This can be construed, at most, as an attempt to plead a cause of action in the nature of intentional interference with prospective advantage. This is the same construction that was placed on plaintiff's *first* amendment by defendant's amended motion for summary judgment, and the trial court expressly rejected such a cause of action in its memorandum opinion. Since the substance of plaintiff's proposed second amendment to his complaint was pleaded and considered, his case could not have suffered from denial of his second motion to amend had the trial court denied it.

At this point, we note our agreement with the trial court's grant of summary judgment in defendant's favor on the cause of action for intentional interference with prospective advantage. Plaintiff has presented no evidence to raise an issue of material fact on any of the elements of that tort in the instant case. See Prosser, *supra*, § 310. He has cited no authority in support of this cause of action, nor even any to show that such a tort is recognized in Tennessee. Further, insofar as we have held that the First Amendment protects defendant against a charge of libel in this case, it would also protect defendant against liability for this tort. Summary judgment was properly granted on this cause of action.

Assignment of Error IV

In this assignment, plaintiff contends that the trial court weighed the evidence and determined the credibility of wit-

nesses, neither of which may properly be done in considering a motion for summary judgment. The only conflict in the evidence that is even arguably material, and the only evidence that could have been weighed or evaluated on the basis of credibility is the inconsistencies in the two depositions of Wll Cheek. These inconsistencies involves what Cheek, one of the sources for the May 30 article, told the Banner in connection with that article. We have already decided, however, that the most favorable view to plaintiff that we could possibly take of Cheek's inconsistent testimony is to disregard it altogether. This decision, fully explained above in our discussion of the issue of actual malice in the publication of the May 30 article, means that it is irrelevant whether or not the trial court weighed Cheek's inconsistent evidence on the issue of actual malice in the publication of that article. In no other instance could the trial court have weighed evidence or gauged credibility, for in no other instance was there any material evidentiary inconsistency capable of being so resolved. We hold that the trial court followed proper summary judgment procedure on all issues which have been discussed, and on which its decisions have been affirmed, in this opinion.

Assignment of Error V

Finally, plaintiff alleges that the trial court erred in granting defendant's motion for summary judgment and dismissing the case. For the reason stated in this opinion we disagree, and affirm the judgment of the trial court.

Affirmed.

/s/ FRANK F. DROWOTA, III,
Judge

Todd, J., concurs in a separate opinion.

Blackburn, Sp. J., concurs.

APPENDIX A

May 30, 1974 Nashville Banner Article

INTENSE DEALING COULD INFLUENCE COURT PICKS

By Ed Long

Intense political maneuvering that has been termed by one insider as "a hell of a lot of dealing" may determine the nominations for the State Supreme Court.

Jockeying, dealing and political pressure are all part of the picture as candidates are attempting to be selected by the State Democratic Executive Committee for the five slots on the ticket for the high court.

The 36 member committee meets here Saturday to narrow a list of eight candidates recommended by the Judicial Selection Commission to five nominees.

But there are some other persons with hats in the ring. And through these persons, deals are being discussed. A "package deal" coming out of West Tennessee focuses on the state attorney general position as being the pawn that could push one candidate onto the ticket.

Indications from Memphis are that former chancellor Robert L. Taylor is attempting to get enough votes to overthrow the recommendation of Justice William H. D. Fones.

Taylor is actively seeking the nomination possibly by working a deal with the liberal element of the executive committee whereby Judicial Selection Commission member Russell Sugarman, a black, would be made attorney general if a "slate" is selected including Taylor.

East Tennessee has for years been the division with only one justice and the attorney general. The Supreme Court selects the attorney general.

The committee is composed of 18 men and 18 women. It is reported that Nashville lawyer Bonnie Cowan is seeking to get the support of the women of the committee.

Three of those recommended by the Selection Commission obviously will not be nominated, but it may be because they have been "cut out" of a deal.

State Sen. Ed Gillock of Memphis, who appeared before the commission as a candidate for the high court and was not recommended, reportedly said there is such a deal being made among committee members.

Gillock said that he is running for the Supreme Court nomination. He is busy contacting committee members to attempt to get their votes. "The situation is very, very fluid at this time and that's all I can say," the senator said.

One member, Ronald Borod, was targeted as the force behind Fones.

A Memphis lawyer and memger of the committee, he said today, "I'm not interested in any deals or trading. I'm a supporter of Justice Fones and I'm interested in the other four seats.

"I'm not part of any move and I don't know about such a move."

Borod is a former law partner of Fones. He said that the justice is "trying to meet personally with the committee members."

Choose Slate

Sen. William Peeler, Waverly, said, "I think there's going to be an effort made to choose a date (sic) of candidates the panel selected.

"There will also be some candidates that will run who were not recommended by the commission. I would expect Bob Taylor would run regardless of what the commission did."

About the possibility of a deal between the candidates to also place a sixth person into consideration who would be named attorney general if a "package" was selected, Peeler said, "There's been some discussion along those lines. I don't know how serious the discussions have been."

The veteran lawmaker indicated that the candidates may be more interested in securing their own nominations than in selecting the attorney general.

Will Cheek of Nashville, secretary of the committee, said, "I haven't seen a block vote or 'slate' happen yet and I don't think it will because of the interpersonal relationship among committee members." He did say that all of the candidates had called him and sent letters to him as well as other members.

"Judges are aware that this type of dealing is illegal, not to mention unjudicial," Cheek said.

Method of Balloting

Gilbert S. Merritt, Jr., the legal counsel for the Judicial selection commission, and Cheek both said that the problem the committee will face Saturday will be in the method of balloting.

The committee will choose a nominee from each of the state's three grand divisions and two at-large candidates.

Merritt indicated that the order in which the candidates are chosen could be extremely important.

Two of the nominees said earlier this week that the important question will be the number of nominees from East Tennessee, which has traditionally only been represented by one justice. With three candidates, it may be that that section of the state will receive two justices in this election.

With only two candidates from West Tennessee, some observers have said that either Fones or Chief Justice Dyer will be dropped from the ticket if a "deal" is consummated.

The chairman of the Judicial Selection Commission, former Vanderbilt Law School Dean John Wade, said today, "I gather there has been some discussion" about the voting Saturday.

"It is not impossible for the candidates to get together but the members of the State Executive Committee would react adversely," Wade said.

In addition to Fones, Dyer and Cowan, those being considered are Nashville lawyer William Harbison, Chattanooga Chancellor Ray Brock, Pulaski lawyer Joe Henry, and Courts of Appeals Judges Charles O'Brien of Crossville and Robert Cooper of Knoxville.

May 31, 1974 Nashville Banner Article

Democratic Committeewoman Tells of Attempt To Influence High Court Vote

SHRIVER PROBING BRIBE TRY

By LARRY BRINTON

A member of the State Democratic Executive Committee today said an attempt was made this week to "buy my vote" for Memphis Attorney Robert Taylor in Saturday's committee election for State Supreme Court nominees.

The charge was leveled by Mrs. Helen A. Brown, of 1811 Beech Ave., and a detailed probe has been launched into the allegation by the staff of Dist. Atty. Gen. Thomas Shriver.

The State Democratic Executive Committee member said the alleged bribe attempt was made Tuesday at her home by a man and woman, whose names she could not recall, but could identify.

"How much financing would it take to get your vote," Mrs. Brown said the man asked after she told him she had not made up her mind as to whom she would vote for Saturday and he allegedly had suggested she vote for Taylor as one of five Democratic nominees.

"My vote is not for sale," the woman said she replied. Mrs. Brown said the answer "irritated" the woman, about 55 years old, who had originally telephoned her on May 23.

Election to Continue

James Sasser, chairman of the State Democratic Executive Committee, said the election will continue Saturday as planned.

"We plan to continue our meeting as planned and to nominate our Supreme Court justices," Sasser explained "I think this sort of attempt to influence voters is reprehensible and shocking, and I think Mrs. Brown is to be congratulated for coming forward."

The committee chairman said the nominees must be certified before the June 6 Democratic Primary election and the election must be held Saturday as planned.

Meantime, Shriver said his investigators began the probe this morning.

"We can't anticipate how long the investigation is going to take, but I doubt seriously it will be completed by Saturday," he commented.

The district attorney said he believed his investigators had learned the identity of the woman and expect to learn from her the man's identity.

Taylor could not be reached for comment. His Memphis law firm reported he was in Nashville for the weekend.

First Contact May 23

Mrs. Brown, serving her first term on the executive committee, said the woman had first contacted her by telephone May 23 stating she wanted to discuss the Davidson County Democratic Executive Committee with her.

"She said she wanted to talk to me about the election of a chairman for the county election committee and she said she also wanted to feel me out on some of the candidates that are coming up for the court nomination," Mrs. Brown told the Banner.

After discussing politics for a few minutes on the telephone, Mrs. Brown said it was agreed that the woman, who identified herself to the committeewoman, would visit Mrs. Brown said, referring to the continue the conversation.

"She came Tuesday, but she didn't say she was going to have anyone with her," Mrs. Brown said, referring to the man who told her he worked at the Metro Courthouse.

"She introduced herself, but I'm not very good on names," she commented. "He introduced himself, also."

"W talked about the county executive committee and she said she didn't like the way things were being run, that people were telling you how to vote and who to vote for," Mrs. Brown recalled.

"I said that politics is kind of dirty and gets nasty sometimes," she added. It was then, Mrs. Brown said, that the unidentified man began naming some of the nominees for the justice posts on the State Supreme Court.

"They asked me who I was in favor of," she said. "I said nobody in particular right now and that my mind was not really made up since I had until Saturday morning to reach a conclusion.

"This man spoke up and said 'how do you feel about Taylor? I feel like he's the man for the job.' "

Taylor Discussed

Mrs. Brown said she told the couple that she didn't favor Taylor over any of the other candidates.

"He said Taylor had done so much for the blacks in the Civil Rights movement." The committee member said they then discussed Taylor's role as chairman of Alabama Gov. George Wallace's Tennessee presidential campaign bid.

"That's when he asked me 'How much financing would it take to get your vote,' Mrs. Brown stated. After stating she wouldn't sell her vote, she said the man said, "I don't want to pressure you, but I wish you would think about it."

After turning down the alleged bribe attempt, Mrs. Brown said, the man "sort of smiled and tried to approach me at a different angle, but the woman called me 'hard-headed' and 'stubborn'."

Mrs. Brown said the man telephoned her Thursday, again identified himself, and inquired if she had changed her mind. The woman said she answered that she still had not decided how she would vote Saturday.

Mrs. Brown later contacted her attorney, Gilbert Merritt, who took a statement from her and turned it over to Shriver.

Taylor was one of a flock of Democrats who sought recommendation to the State Supreme Court by a special commission named by the Democratic Executive Committee.

The commission recommended eight persons, from which the executive committee can nominate five. Taylor was not one of the eight, but he still hopes to be one of the five nominees.

In its meeting Saturday, the executive committee is under no obligation to choose from the eight people recommended by the special commission.

Committee members privately have confided that the political infighting and dealing for the five posts have been fierce

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SEPARATE CONCURRING OPINION

Although the majority opinion mentions my views on the impropriety of the actions alleged in the May 30, 1974, article, I am disappointed that my colleagues are unwilling to join me in unequivocally condemning actions prohibited by the prescribed ethical standards for the bench and bar.

The Code of Professional Responsibility adopted by the American Bar Association and by the Supreme Court of this State prior to May, 1974, provides:

> "D.R. 8-103, *Lawyer Candidate for Political Office.* A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Canon 7 of the Code of Judicial Conduct."

The Code of Judicial Conduct promulgated by the American Bar Association states:

> "B. Campaign Conduct.
>
> (1) A candidate . . . for judicial office . . ."
>
> . . .
>
> . . .

(c) should not make pledges or promies of conduct in office other than the faithful and impartial performance of the duties of his office."

The article of May 30, 1974, charged plaintiff with violating the provisions just quoted.

The import of the article was not merely that plaintiff offered a promise of "support" for a candidate for Attorney General. Due to the fact that the Attorney General was to be elected by the members of the Supreme Court, the promise of "support" by necessary inference included the promise of the *vote* of plaintiff as a sitting justice of the Supreme Court.

I cannot agree that the violation of the quoted provision of the Code of Judicial Conduct is permissible activity for a judicial candidate "in the context of the politics surrounding major party nominations." Such conduct is prohibited, wrong, and disgraceful. It is proper grounds for discipline of a lawyer and removal of a judge for misconduct. This Court should not condone it as permissible.

Such conduct being as previously chaarcterized, the imputation of such conduct is of necessity libelous.

I challenge this Court and the Supreme Court to declare in ringing and decisive tones that, regardless of the method of selecting judges, the prescribed standards of professional and judicial conduct are mandatory at all times and that there is no holiday from them during an election season.

Nevertheless, I am willing to accept the conclusion of the majority regarding the article of May 30, 1974, on the ground that the record fails to disclose any grounds of malice, knowledge of falsity, or reckless disregard of truth.

As to the May 31, 1974, article, I concur fully with the majority opinion.

/s/ Henry F. Todd,
Judge

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OPINION ON PETITION TO REHEAR

(Filed May 16, 1978)

Plaintiff Taylor has filed a brief petition to rehear in which he asks how this Court can ignore the first deposition of Will Cheek and "import absolute verity" to the second. We think it clear from the principal opinion, however, that we did not view Cheek's depositions in this way. Rather, we assumed that his inconsistent statements had the effect of "cancelling each other out," which left us with the testimony of Morrell and Long that Cheek was their source for the disputed statement in the article of May 30, 1974. Our approach to this issue has been fully explained in the principal opinion and will not be further recapitulated here.

The petition to rehear is respectfully denied.

/s/ Frank F. Drowota, III
Judge

Todd, J., concurs.

Blackburn, Sp. J., concurs.

APPENDIX B

In the Supreme Court of Tennessee
at Nashville

Robert L. Taylor,
Petitioner,
vs.
Nashville Banner Publishing Company,
Respondent.
} Davidson Law.

ORDER

(Filed November 6, 1978)

On considering the petition for certiorari and briefs filed in this case and the entire record, the petition of Robert L. Taylor is denied at cost of the petitioner.

PER CURIAM

Not Participating:

Fones, J.